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THE AMERICAN STUDENTS' BLACKSTONE.

COMMENTARIES
ON
THE LAWS OF ENGLAND;
IN FOUR BOOKS,

BY
SIR WILLIAM BLACKSTONE, KNIGHT,
ONE OF THE JUSTICES OF THE COURT OF COMMON PLEAS.

SO ABRIDGED AS TO RETAIN ALL PORTIONS OF THE ORIGINAL WORK WHICH ARE OF HISTORICAL
OR PRACTICAL VALUE,

WITH NOTES, AND REFERENCES TO AMERICAN DECISIONS;
FOR THE USE OF AMERICAN STUDENTS.

BY
GEORGE CHASE, LL. B.,
PROFESSOR OF LAW IN THE NEW YORK LAW SCHOOL, NEW YORK CITY, AND DEAN OF
THE FACULTY; EDITOR OF STEPHEN'S DIGEST OF THE LAW OF EVIDENCE
(AMERICAN EDITION).

THIRD EDITION.

NEW YORK:
BANKS & BROTHERS, LAW PUBLISHERS,
20 MURRAY STREET.
ALBANY: 475 BROADWAY.

1894.

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NOTE TO SECOND EDITION.

To this edition several appendixes have been added, containing special information for the assistance of the student ; also a new and much fuller index than was contained in the former edition. Such changes have also been made in the notes as were necessary to adapt them to the present state of the law ; and additional cases of value have been cited.

G. C.

NEW YORK, *January*, 1884.

NOTE TO THIRD EDITION.

In this edition an additional appendix has been inserted, containing a translation of the Latin, French, and other foreign expressions used by Blackstone. Important additions have also been made to the other appendixes.

The notes running through the body of the work have been brought down to date by necessary changes and the citation of recent cases.

G. C.

NEW YORK, *October*, 1890.

P R E F A C E.

THE unrivalled merits of Blackstone's Commentaries as an elementary treatise upon the principles of the common law are as fully recognized to-day as at any time in the past, as is attested by the fact that no work is so commonly used as this for purposes of preliminary legal instruction either by lawyers in their offices or by professional instructors in schools and colleges of law. The clearness, grace, and elegance of style, the lucid precision of statement, the happy union of conciseness with great comprehensiveness of treatment, the orderly and logical development of legal topics, the attentive regard to the needs of students exhibited by the frequent explanations of technical expressions, by the abundance of illustration, and by the careful unfolding of the reasons upon which particular principles of law are founded,—these are qualities which have rendered, and still render, the work admirably adapted for purposes of education, and have made it particularly attractive to students and general readers. But notwithstanding these acknowledged merits, it is now generally recognized that these Commentaries, in their original form, have been by the lapse of time, rendered less useful than formerly for purposes of instruction, since students find in them not only the body of the living law, but also much that is dead law, and are thereby confused and perplexed. Considerable portions of the original text have become wholly obsolete, and are of little or no importance, even on historical grounds. The mind of the learner is thus uselessly bewildered with unimportant details which burden the memory, and give erroneous ideas as to the present state of the law. This defect is all the more serious from the fact that students read this work at the outset of their studies, when they have no fund of acquired legal knowledge which would enable them to discriminate between those principles which are still in force, and those which have ceased to be a part of the law. A large part of the original work is, moreover, given up to the consideration of topics which relate exclusively to the English governmental and ecclesiastical system, and are of little value to the American student, particularly at the beginning of his

legal studies. These chapters are seldom, if ever, studied in this country, and have lost much of their original importance even to English students, having been in large measure superseded by able treatises of a later date upon the British constitution. It is a further defect in the Commentaries that some legal topics of great importance are treated with undue brevity or are scarcely noticed at all. Particularly is this remark applicable to the chapters upon the Domestic Relations and to those treating of Criminal Law. Such subjects, for instance, as the responsibility of masters for the wrongful acts of their servants, or the liability of infants for their acts, are most meagrely and inadequately treated. In criminal law the subjects of Embezzlement and False Pretences are not considered, while Larceny and Forgery are discussed with insufficient fullness. The important topic of Easements, in the law of real property, is also almost entirely undeveloped, only a single variety of easements (that of "Ways") being referred to. So the subject of Fixtures is not discussed, notwithstanding its great consequence in real estate law. The law of Landlord and Tenant is also very meagrely presented. The same is true of the law of Bailment and other important subjects.

The object of this edition has been to retain all the conspicuous and acknowledged merits of the Commentaries in their unabridged form, while the defects and imperfections which impair the usefulness of the work are carefully removed. Obsolete matter, which is of no historical value as regards the development of the law as a scientific system of principles, has been omitted, wherever this could be done without destroying the connection of thought. The chapters which relate to the English form of government, as for example, those treating of the "King's Royal Family," the "King's Revenue," etc., have also been omitted, as of no importance to the American student in an elementary treatise upon the general principles of the common law. Subjects insufficiently developed in the original work are discussed in the copious notes which are appended to the text.

But it should be remarked that while omissions have been made of unimportant matter, everything has been retained which is of either historical or practical value for the student of law. Much that is obsolete is yet of great historical value, and this has been sedulously retained; as, for example, such topics as the feudal system, fines and recoveries, the ecclesiastical courts of England, the benefit of clergy, practice and pleading at common law, etc. It is of fundamental con-

sequence that these topics should be thoroughly studied, in order to gain an insight into the historical development of the law. All portions of the original work which state the principles of the living law will be found in this edition in a complete and unaltered form. The text of this edition is in Blackstone's own language, no changes having been made, except to make omissions of chapters or passages. The only exception to this is in the chapter on Bankruptcy (pp. 583-588), where the provisions of statutes now in force have been stated in lieu of those in force when Blackstone wrote. The preservation of the exact language of the original work has been deemed of prime importance, that Blackstone's inimitable style might not suffer detriment. Inadequacy of treatment or inaccuracy of statement has been corrected by the insertion of notes, not by altering the text.

The abundant notes which have been added by the editor throughout the work, are intended to afford a fuller elucidation of important principles, to illustrate the statements of the text by decisions drawn from the leading American reports, to exhibit whatever marked changes have been made in the law in the course of adjudication or by specific legislation, to correct inaccuracies of statement, and in various ways to supplement the original text and repair its deficiencies. These notes have been made as concise as is consistent with adequate comprehensiveness, and it has been attempted to make them as clear and elementary in style as the text of the work itself. The editor has found in his own experience that the extensive annotations usually appended to editions of Blackstone confuse and perplex students rather than enlighten and assist them, since they consist too much of minutely detailed statements of nice legal distinctions, expressed oftentimes in technical phraseology, rather than state the general principles of law in a systematic form. But Blackstone only intended his treatise to be elementary, stating fundamental legal doctrines, and the notes should be in the same form. Such has been the editor's purpose, and it is hoped that the notes will be found clear, accurate, and eminently readable.

A few notes have been retained from various English editions. These are designated either by the name of the author, or by being enclosed in brackets. Blackstone's own notes are designated by the letters of the alphabet. For the other notes the editor himself is responsible.

In the first two books of the Commentaries, the chapters which have been retained have been preserved intact, in nearly every instance,

and the paging of the original edition has been inserted in the margin for convenience of reference. And throughout this edition, the numbering of the original chapters has been prefixed in brackets at the head of each chapter. In this way this edition can be used in connection with the unabridged edition, since lessons can be assigned to classes by the original chapters and paging. In the third and fourth books the marginal paging has not been retained, as it was found impracticable to preserve the chapters intact, obsolete matter being sometimes necessarily omitted in the very midst of chapters. By a judicious condensation of these two books, it is believed that they have been rendered much more readable, and afford a more satisfactory presentation of the law in its present condition. The chapters on criminal law, for instance, abounded with statements of the provisions of ancient statutes, which are now wholly obsolete, and have been superseded by later legislation. Owing to this cause, the study of these two books has proved both bewildering and unsatisfactory. In this edition the living law has been retained, the dead matter cut away.

This edition is now sent forth for the use of American students, in the hope and wish that it may render the study of this famous legal classic more attractive and more profitable, and that it may prove a valuable aid at their introduction into legal study. If it serve no better purpose than to guide the student and general reader in determining what portions of the Commentaries he should read, its usefulness, it is believed, will be cordially appreciated. This has long been the great difficulty with students in undertaking to read Blackstone. Some read everything in order to lose nothing valuable, and thus burden the memory with much useless and obsolete matter. Others omit whatever is obsolete, and thus fail to read much that is of great historical importance. In this edition, everything in the original text has been included which the editor's experience has led him to conclude should be read by students, and its contents should therefore be diligently studied from cover to cover. It contains whatever portions of the original text are studied in the law schools of this country, so that it will serve both for students in such institutions and for those who study by themselves or in offices. To the considerate judgment of law students and of legal instructors throughout the country, it is hopefully submitted.

G. C.

NEW YORK, *October, 1877.*

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INTRODUCTION.

OF THE NATURE AND EXTENT OF THE LAWS OF ENGLAND.

SECTION I.

[BLACKSTONE'S 'COMM.—INTRODUCTION.—SECTION II.]

Of the Nature of Laws in General.

LAW, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action which is prescribed by some superior, and which the inferior is bound to obey.¹

¹“The word ‘law’ has come down to us in close association with two notions, the notion of *order* and the notion of *force*. The association is of considerable antiquity, and is disclosed by a considerable variety of languages; and the problem has repeatedly suggested itself, which of the two notions thus linked together is entitled to precedence over the other, which of them is first in point of mental conception? The answer, before the Analytical Jurists* wrote, would on the whole have been, that ‘law’ before all things implied order. ‘Law, in its most general and comprehensive sense, signifies a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics or mechanics, as well as the laws of nature and of nations.’ With these words Blackstone begins his chapter on ‘The Nature of Laws in General.’ * * The Analytical Jurists, on the other hand, lay down unhesitatingly that the notion of force has priority over the notion of order. They say that a true law, the command of an irresistible sovereign, en-

* By the phrase “Analytical Jurists,” the writer refers chiefly to those eminent English writers upon jurisprudence and legislation, Jeremy Bentham and John Austin.

Thus, when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into

joins a class of acts or a class of omissions, either on a subject or on a number of subjects, placed by the command alike and indifferently under a legal obligation. * * * Law, when used in such expressions as the Law of Gravity, the Law of Mental Association, or the Law of Rent, is treated by the Analytical Jurists as a word wrested from its true meaning by an inaccurate figurative extension. But I suppose that if dignity and importance can properly be attributed to a word, there are in our day few words more dignified and more important than Law, in the sense of the invariable succession of phenomena, physical, mental, or even politico-economical. With this meaning, 'law' enters into a great deal of modern thought, and has almost become the condition of its being carried on.

* * * The laws with which the student of Jurisprudence is concerned in our own day are undoubtedly either the actual commands of sovereigns, understood as the portion of the community endowed with irresistible coercive force, or else they are practices of mankind brought under the formula, 'A law is a command,' by help of the formula, 'whatever the sovereign permits is his command.' * * * But has the force which compels obedience to a law always been of such a nature that it can reasonably be identified with the coercive force of the sovereign, and have laws always been characterized by that generality which, it is said, alone connects them with physical laws, or general formulas describing the facts of nature?"

* * * My conclusion is that "there are two types of organized political society. In the more ancient of these, the great bulk of men derive their rules of life from the customs of their village or city, but they occasionally, though most implicitly, obey the commands of an absolute ruler, who takes taxes from them, but never legislates. In the other, and the one with which we are most familiar, the sovereign is ever more actively legislating on principles of his own, while local custom and idea are ever hastening to decay. It seems to me that in the passage from one of these political systems to another laws have distinctly altered their character. The Force, for example, which is at the back of law, can only be called the same by a mere straining of language. Customary law is not obeyed, as enacted law is obeyed. When it obtains over small areas and in small natural groups, the penal sanctions on which it depends are partly opinion, partly superstition, but to a far greater extent, an instinct almost as blind and unconscious as that which produces some of the movements of our bodies. The actual constraint which is required to secure conformity with usage is inconceivably small. When, however, the rules which have to be obeyed once emanate from an authority external to the small natural group and forming no part of it, they wear a character wholly unlike that of a customary rule. They lose the assistance of superstition, probably that of opinion, certainly that of spontaneous impulse. The force at the back of law comes, therefore, to

motion, he established certain laws of motion, to which all moveable bodies must conform. And, to descend from the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he establishes, at his own pleasure, certain arbitrary laws for its direction,—as that the hand shall describe a given space in a given time, to which law as long as the work conforms, so long it continues in perfection, and answers the end of its formation.

If we farther advance, from mere inactive matter to vegetable and animal life, we shall find them still governed by laws, more numerous indeed, but equally fixed and invariable. The whole progress of plants, from the seed to the root, and from thence to the seed again; the method of animal *nutrition, digestion, [*39 secretion, and all other branches of vital economy; are not left to chance, or the will of the creature itself, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great Creator.

This, then, is the general signification of law, a rule of action dictated by some superior being; and, in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of *human* action or conduct; that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behaviour.

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. A being independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him on whom he

be purely coercive force to a degree quite unknown in societies of the more primitive type. * * * The generality of laws and their dependence on the coercive force of a sovereign are the result of the great territorial area of modern States, of the comminution of the sub-groups which compose them, and above all of the example and influence of the Roman Commonwealth, under Assembly, Senate, and Prince.” (Sir Henry Sumner Maine, *The Early History of Institutions*, Lect. xiii.)

depends as the rule of his conduct; not, indeed, in every particular, but in all those points wherein his dependence consists. This principle, therefore, has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less, absolute or limited. And consequently, as man depends absolutely upon his Maker for everything, it is necessary that he should, in all points, conform to his Maker's will.

This will of his Maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion, so, when he created man, and endued him with *40] freewill to conduct himself in all parts of *life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

Considering the Creator only as a being of infinite *power*, he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But, as he is also a being of infinite *wisdom*, he has laid down only such laws as were founded in those relations of justice that existed in the nature of things antecedent to any positive precept. These are the eternal immutable laws of good and evil, to which the Creator himself, in all his dispensations, conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such, among others, are these principles: that we should live honestly, should hurt nobody, and should render to every one his due; to which three general precepts Justinian (a) has reduced the whole doctrine of law.

But if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be obtained than by a chain of metaphysical disquisitions, mankind would have wanted some inducement to have quickened their inquiries, and the greater part of the world would have rested content in mental indolence, and ignorance, its

(a) *Furis præcepta sunt hæc, honeste vivere, alterum non lædere, suum cuique tribuere.*—*Inst. I. i. 3.*

inseparable companion. As, therefore, the Creator is a being not only of infinite power, and wisdom, but also of infinite goodness, he has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, he *has not [*41 perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised, but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own true and substantial happiness." This is the foundation of what we call ethics, or natural law; for the several articles into which it is branched in our systems, amount to no more than demonstrating that this or that action tends to man's real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man's real happiness, and therefore that the law of nature forbids it.

This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this;² and

² "Blackstone may here mean that all human laws ought to conform to the Divine laws. If this be his meaning, I assent to it without hesitation. Perhaps, again, he means that human law-givers are themselves obliged by the Divine laws to fashion the laws which they impose by that ultimate standard, because, if they do not, God will punish them. To this, also, I entirely assent. But the meaning of this passage seems rather to be this: that no human law which conflicts with the Divine law is obligatory or binding; in other words, that no human law which conflicts with the Divine law *is a law*; for a law without an obligation is a contradiction in terms. I suppose this to be his meaning, because when we say of any transaction that it is invalid, we mean that it is not binding. Now, to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually

such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

But, in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason, whose office is to discover, as was before observed, what the law of nature directs in every circumstance of life, by considering what method will tend the most effectually to our own substantial happiness. And if our reasons were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

This has given manifold occasion for the benign interposition of laws by judicial tribunals. The existence of law is one thing; its merit or demerit another." (Austin on *Jurisprudence*: Eng. Ed., p. 220, note.)

Blackstone's probable meaning in this passage was, that from the standpoint of true morality, and *in foro conscientiae*, a man's duty to God may oblige him to violate a human law, when that is clearly in conflict with a Divine law; for he says subsequently, in regard to murder, which he declares is "expressly forbidden by the Divine law," that "if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the Divine." He here evidently uses the word "bound" as denoting obligation arising solely under the Divine law, and places this obligation in direct opposition to that which the human law, considered merely as a positive direction of the law-giving power in human society, would impose. The difficulty in explaining this passage seems to have arisen from not discriminating carefully between the diverse sanctions upon which the idea of obligation is to be based. It is plainly apparent that a human law might be directly in conflict with a universally received principle of moral duty, and there could be no question in such a case that a man would be under a *moral* obligation to violate the law; but human tribunals, established to enforce the law, would still hold him under a *legal* obligation to observe the law, and would punish its infraction. In fact, such tribunals could not do otherwise if they fulfilled their purpose. And as positive laws seldom or never conflict with principles of morals which are of universal acceptance, it would lead to pernicious results if men were not held strictly bound to obey every established law, whether they deemed it right or wrong, just or unjust; for, otherwise, each man's conscience would be set above positive law; and men's consciences are very variable, when their interest or personal gratification is concerned.

tion of divine Providence, which, in compassion to the frailty, the imperfection, and the blindness of human reason, *hath [*42 been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state ; since we find that, until they were revealed, they were hid from the wisdom of ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system which is framed by ethical writers, and denominated the natural law ; because one is the law of nature, expressly declared so to be by God himself ; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority ; but, till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws ; that is to say, no human laws should be suffered to contradict these. There are, it is true, a great number of indifferent points in which both the divine law and the natural leave a man at his own liberty, but which are found necessary, for the benefit of society, to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy ; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former. For instance in the case of murder : this is expressly forbidden by the divine, and demonstrably by the natural law ; and, from these prohibitions, arises the true unlawfulness of this crime. Those human laws that annex a punishment to it do not at all increase its moral guilt, or *superadd any fresh obligation, *in foro conscientiæ*, to [*43 abstain from its perpetration. Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that

human law, or else we must offend both the natural and the divine. But, with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws,—such, for instance, as exporting of wool into foreign countries,—here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not

If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws than the law of nature, and the law of God. Neither could any other law possibly exist: for a law always supposes some superior who is to make it; and, in a state of nature, we are all equal, without any other superior but Him who is the author of our being. But man was formed for society; and, as is demonstrated by the writers on this subject, is neither capable of living alone, nor indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society they must necessarily divide into many, and form separate states, commonwealths, and nations entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse, called "the law of nations," which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any, but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities: in the construction also of which compacts we have no other rule to resort to, but the law of nature; being the only one to which all the communities are equally subject: and therefore the civil law very justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium*.

*44] *Thus much I thought it necessary to premise concerning the law of nature, the revealed law, and the law of nations, before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities, or nations are governed; being thus defined by Justinian "*jus civile est quod quisque sibi populus constituit*." I call it *municipal* law, in compliance with common speech; for though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation which is governed by the same laws and customs.

Municipal law, thus understood, is properly defined to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."⁸ Let us endeavor to explain its several properties as they arise out of this definition. And first, it is a rule: not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attain him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason: this has permanency, uniformity, and universality, and therefore is properly a *rule*. It is also called a *rule* to distinguish it from *advice* or *counsel*, which we are at liberty to follow or not, as we see proper and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the *law* depends not upon *our approbation*, but upon the *Maker's will*. Counsel is only a matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also. *It is also called a *rule*, to distinguish it from a *compact* [*45 or *agreement* for a compact is a promise proceeding *from* us, law is a command directed *to* us. The language of a compact is, "I

⁸ A municipal law is completely expressed by the first branch of the definition: "A rule of civil conduct prescribed by the supreme power in a state." And the latter branch "commanding what is right and prohibiting what is wrong," must either be superfluous, or convey a defective idea of a municipal law; for if right and wrong are referred to the municipal law itself, then whatever it commands is right, and whatever it prohibits is wrong, and the clause would be insignificant tautology. But if right and wrong are to be referred to the laws of nature, then the definition will become deficient or erroneous; for though the municipal law may seldom or never command what is wrong, yet in ten thousand instances it forbids what is right. It may forbid an unqualified person to kill game; it may forbid a man to exercise a trade without serving as an apprentice, etc. Now all these acts were perfectly right before the prohibition of the municipal law. (CHRISTIAN'S note, modified.)

On account of this objection to the definition as given in the text, Judge Sharswood has proposed to modify it so that it shall read thus: Municipal law is a rule of civil conduct prescribed by the supreme power in a state, commanding what is to be done, and forbidding the contrary.

will, or will not, do this ;" that of a law is, " thou shalt, or shalt not do it." It is true there is an obligation which a compact carries with it, equal in point of conscience to that of a law : but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it ; in laws, we are obliged to act without ourselves determining or promising anything at all. Upon these accounts law is defined to be "*a rule.*"

Municipal law is also "*a rule of civil conduct.*" This distinguishes municipal law from the natural, or revealed ; the former of which is the rule of *moral* conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbor, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbor than those of mere nature and religion : duties, which he has engaged in by enjoying the benefits of the common union ; and which amount to no more than that he do contribute, on his part, to the subsistence and peace of the society.

It is likewise "*a rule prescribed.*" Because a bare resolution confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified, *viva voce*, by officers appointed for that purpose, as is done with regard to proclamations, and such acts of *46] parliament as are appointed* to be publicly read in churches and other assemblies. It may lastly be notified by writing, printing, or the like ; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner ; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto* ; when after an

action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust.⁴ All laws should be therefore made to com-

⁴ The United States Constitution prohibits Congress and the State Legislatures from passing *ex post facto* laws. (Const., Art. I, §§ 9, 10). A similar provision is also contained in many of the State Constitutions. The phrase "*ex post facto*" does not apply to retrospective legislation, which is *civil* in its nature, affecting private rights retroactively, but only to *penal* and *criminal* proceedings which impose punishments or forfeitures. Retrospective *civil* laws may be invalid for other reasons, but they do not come within the scope of this particular Constitutional prohibition. In the leading case of *Calder v. Bull*, 3 Dallas 386, *ex post facto* laws were classified as follows: (1) "Every law that makes an action done before the passage of the law, and which was innocent when done, criminal, and punishes such action"; (2), "Every law that aggravates a crime, or makes it greater than when it was committed"; (3), "Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed"; (4), "Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender." But a law which *mitigates* the severity of criminal procedure, as by reducing or diminishing the punishment with which an act was punishable when committed, without changing the kind of punishment, is not *ex post facto*. Thus a law changing the penalty for a certain offence from imprisonment for thirty days to imprisonment for twenty days would be valid as to past offences; but a law changing the penalty from death to imprisonment for life would be *ex post facto* and void, because there is a change in the *kind* of punishment. If this were not the rule, it would be "left to the discretion of the legislature and of judges to say whether the new punishment is or is not more merciful or lenient than the old, and such a construction of the Constitutional prohibition would impair its value and certainty of protection" (*Shepherd v. People* 25 N. Y. 406). In *Hartung v. People*, 22 N. Y. 95, it was held that when a statute, which prescribed the death penalty for the crime of murder, and required that not less than four, nor more than eight weeks, should intervene between the sentence and the execution, was repealed by a statute which prescribed one year's imprisonment in a state prison at hard labor previously to the execution of the death penalty and also provided that the prisoner should not be executed at the end of the year until the Governor had issued a warrant to the sheriff directing it,—the latter statute was void as to offences of this kind, committed while the former statute was in force, (See further, *Kring v. Missouri*, 107 U. S. 221; *Hopt v. Utah*, 110 U. S. 574; *Cummings v. Missouri*, 4 Wallace, 277; *Moore v. State*, 43 N. J. L. 203.)

mence *in futuro*, and be notified before their commencement : which is implied in the term "*prescribed*." ⁶ But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith ; for if ignorance, of what he *might* know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

But farther : municipal law is "a rule of civil conduct prescribed by the supreme power in a state." For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms : one cannot subsist without the other.

⁵ It is a general rule in the interpretation of statutes that they should not be allowed a retrospective operation, when this is not required by express command or by necessary and unavoidable implication. Without such command or implication, they speak and operate upon the future only. (*Chew Heong v. United States*, 112 U. S. 536 ; *Dash v. Van Kleeck*, 7 John R., 477.) The legislature is competent to give a statute a retrospective effect, except as prohibited by the constitution from passing *ex post facto* laws, or laws impairing the obligation of contracts ; or unless vested rights of property would be affected. Some laws are necessarily retrospective, such as laws for confirming official acts, amending charters, correcting assessment rolls, relating to remedies, etc. (*People v. Supervisors*, 43 N. Y. 130 ; *Lane v. Nelson*, 79 Pa. St. 407 ; *Sturges v. Carter*, 114 U. S. 511 ; *People v. Spicer*, 99 N. Y. 225 ; *Forster v. Forster*, 129 Mass. 559.) "Remedial statutes may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy, by curing defects, and adding to the means of enforcing existing obligations." (Kent's Comm. i. 455.) But in some states, retrospective laws are prohibited by constitutional provisions. (Kent's Comm. i. 455 note.)

⁶ It was formerly the rule in England that acts of Parliament took effect by relation from the first day of the session in which the statute was enacted, unless the act itself provided otherwise. The entire session was deemed, by a fiction of law, to be only a single day. This rule operated at times very unjustly, since a man might be held liable for the violation of a statute which had not been enacted at the time when he did the act complained of. It was therefore repealed by the act 33 Geo. III., ch. 13, which provided that statutes should have effect only from the time of receiving the royal assent. In New York it is provided that every law, unless a different time be prescribed therein, shall take effect on and not before the 20th day after the day of its final passage. (Rev. St. i. 157.) Similar statutes have been passed in some of the other states, though the period of time prescribed varies considerably. Acts of Congress, approved by the President, take effect from the time of such approval. (*Burgess v. Salmon*, 97 U. S. 38.)

* This will naturally lead us into a short inquiry concern-^{*} [47
ing the nature of society and civil government; and the natural, inherent right that belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing laws.

➤ The only true and natural foundations of society are the wants and the fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society either natural or civil; and that from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor. This notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted: and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both which were effected by the means of single families. These formed the first natural society, among themselves; which, every day extending its limits, laid the first though imperfect rudiments of civil or political society: and when it grew too large to subsist with convenience in that pastoral state, wherein the patriarchs appear to have lived, it necessarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent: and various tribes, which had formerly separated, reunited again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though society had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the *sense* of their weakness and imperfection that *keeps* mankind together; that demonstrates the necessity of this union; and that therefore is the solid and natural foundation, as well as the cement of civil society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, ^{*} in the very act of associating together: namely, [*48 that the whole should protect all its parts, and that every part should pay obedience to the will of the whole, or, in other words, that the community should guard the rights of each individual

member, and that (in return for this protection) each individual should submit to the laws of the community ; without which submission of all it was impossible that protection should be certainly extended to any.

For when civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society in order. Unless some superior be constituted whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But, as all the members which compose this society were naturally equal, it may be asked, in whose hands are the reins of government to be entrusted? To this the general answer is easy ; but the application of it to particular cases has occasioned one half of those mischiefs, which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons, in whom those qualities are most likely to be found, the perfection of which is among the attributes of him who is emphatically styled the Supreme Being ; the three grand requisites, I mean of wisdom, of goodness, and of power : wisdom, to discern the real interest of the community ; goodness, to endeavour always to pursue that real interest ; and strength, or power, to carry this knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well constituted frame of government.)

How the several forms of government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. It is not my business or intention to enter into any of them. However they began, or *49] by * what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside. And this authority is placed in those hands, wherein (according to the opinion of the founders of such respective states, either expressly given, or collected from their tacit approbation) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found.

The political writers of antiquity will not allow more than three regular forms of government ; the first, when the sover-

sovereign power is lodged in an aggregate assembly consisting of all the free members of a community, which is called a democracy ; the second, when it is lodged in a council, composed of select members, and then it is styled an aristocracy ; the last, when it is entrusted in the hands of a single person, and then it takes the name of a monarchy. All other species of government, they say, are either corruptions of, or reducible to, these three.

By the sovereign power, as was before observed, is meant the making of laws ; for wherever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases ; by constituting one, or a few, or many executive magistrates : and all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end.⁷

There is a fundamental difference between the power and authority of the legislative branch of the Government in England and in the United States. The English Parliament is not limited, as regards the scope and extent and subject-matter of legislation, by a written constitution defining and restricting its powers, and its enactments therefore constitute the supreme law of the land and are absolutely binding upon the courts, which have no option but to appropriately enforce them. It is for this reason that Parliament is sometimes said to be "omnipotent." What is spoken of as the "English Constitution" embraces the body or system of laws, rules, principles and established usages, upon which is based the organization of the Government, the relation of its various departments or branches to each other, and the nature of their functions, and in accordance with which the administration of the Government is regularly conducted. But this Constitution, based as it is upon previous acts of Parliament, upon custom and tradition, is subject to change and modification by other acts of Parliament, though it is undoubtedly true, that it has, by force of precedent, and by the natural effect of ordinary usage upon the habits and ideas of the people, great controlling and restrictive power upon the course of legislation. But in the United States, legislation is uniformly controlled by written constitutions adopted by the people in their sovereign capacity. The United States Constitution limits and defines the powers of Congress, and is also binding upon the legislatures of the several States, so that their enactments cannot violate its provisions. The legislation of the States is also further controlled by the special constitution which each has adopted. To the courts is committed the power and duty of determining whether particular enactments are in conformity with

In a democracy, where the right of making laws resides in the people at large, public virtue, or goodness of intention, is more likely to be found, than either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution ; but generally mean to do the thing that is right and just, and have always a degree *50] of patriotism or public spirit. In *aristocracies there is more wisdom to be found, than in the other frames of government ; being composed, or intended to be composed, of the most experienced citizens . but there is less honesty than in a republic, and less strength than in a monarchy. A monarchy is indeed the most powerful of any ; for, by the entire conjunction of the legislative and executive powers, all the sinews of government are knitted together, and united in the hand of the prince : but then there is imminent danger of his employing that strength to improvident or oppressive purposes.

Thus these three species of government have, all of them, their several perfections and imperfections. Democracies are usually the best calculated to direct the end of a law ; aristocracies to invent the means by which that end shall be obtained ; and monarchies to carry those means into execution. And the ancients, as was observed, had in general no idea of any other permanent form of government but these three : for though Cicero declares himself of opinion, "*esse optime constitutam rempublicam quæ ex tribus generibus illis, regali, optimo, et populari, sit modice confusa ;*" yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim, and one that, if effected, could never be lasting or secure.

But, happily for us of this island, the British constitution has long remained, and I trust will long continue, a standing exception to the truth of this observation. For, as with us the execu-

Constitutional provisions ; and if it is adjudged that they are not, such laws are pronounced null and void, either in whole or in part. (*Civil Rights Cases*, 103 U. S. 3 ; *Baldwin v. Franks*, 120 U. S. 678 ; *Duryee v. Mayor of N. Y.*, 96 N. Y. 477.) This is not, however, done by the courts of their own motion, but only in the course of decision of actually litigated causes in which the constitutionality of the statute is essentially involved. But all statutes not in conflict with the provisions of the Constitution of the State or of the United States are as supreme and absolute, within their appropriate sphere, as the acts of the English Parliament.

tive power of the laws is lodged in a single person, they have all the advantages of strength and dispatch, that are to be found in the most absolute monarchy: and as the legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other; first, the king; secondly, the lords spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, *their birth, their wisdom, their [*51 valor, or their property; and, thirdly, the House of Commons, *freely chosen by the people from among themselves*, which makes it a kind of democracy: as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of every thing; there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous.

Here then is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government so well and so happily united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristocracy, or democracy; and so want two of the three principal ingredients of good polity, either virtue, wisdom, or power. If it were lodged in any two of the branches; for instance, in the king and House of Lords, our laws might be providently made, and well executed, but they might not always have the good of the people in view: if lodged in the king and commons, we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford; if the supreme rights of legislature were lodged in the two houses only, and the king had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the executive power. But the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the

independence of any one of the three should be lost, or that it should become subservient to the views of either of the other *52] two, there would *soon be an end of our constitution. The legislature would be changed from that which (upon the supposition of an original contract, either actual or implied) is presumed to have been originally set up by the general consent and fundamental act of the society; and such a change, however effected, is, according to Mr. Locke (who perhaps carries his theory too far), at once an entire dissolution of the bands of government; and the people are thereby reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power.

Having thus cursorily considered the three usual species of government, and our own singular constitution, selected and compounded from them all, I proceed to observe, that, as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws; that is, in the words of our definition, *to prescribe the rule of civil action*. And this may be discovered from the very end and institution of civil states. For a state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any *natural* union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can therefore be no otherwise produced than by a *political* union; by the consent

* If it be true that there would be an end of the Constitution if at any time one of the three should become subordinate to the views of the other branches, then, assuredly, the Constitution is at an end: for it would be difficult to contend that in the times of Henry VIII. and Elizabeth, the two Houses of Parliament were not subservient to the Crown, or that before the reform act the House of Lords had not the ascendancy, or that, since that act, the House of Commons have not had it. Indeed, it does not seem easy to name any eventful period of our Constitutional history when the exact equilibrium of powers, referred to by Blackstone, existed. That this supposed theory of our Constitution is now denied by political writers of different parties, is at any rate indisputable.—STEWART.

of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is entrusted ; and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be *law*.

Thus far as to the *right* of the supreme power to make laws ; but farther, it is its *duty* likewise. For since the *respective [*53 members are bound to conform themselves to the will of the state, it is expedient that they receive directions from the state declaratory of that its will. But, as it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action, it is therefore incumbent on the state to establish general rules, for the perpetual information and direction of all persons in all points, whether of positive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's ; what absolute and what relative duties are required at his hands ; what is to be esteemed honest, dishonest, or indifferent ; what degree every man retains of his natural liberty ; what he has given up as the price of the benefits of society ; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquillity.

From what has been advanced, the truth of the former branch of our definition is, I trust, sufficiently evident ; that "*municipal law is a rule of civil conduct prescribed by the supreme power in a state.*" I proceed now to the latter branch of it ; that it is a rule so prescribed, "*commanding what is right and prohibiting what is wrong.*"

Now, in order to do this completely, it is first of all necessary that the boundaries of right and wrong be established and ascertained by law. And when this is once done, it will follow of course that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights, and to restrain or redress these wrongs. It remains therefore only to consider in what manner the law is said to ascertain the boundaries of right and wrong ; and the methods which it takes to command the one and prohibit the other.

For this purpose every law may be said to consist of several parts : one, declaratory whereby the rights to be observed, and

*54] the wrongs to be eschewed, are clearly defined and *laid down: another, directory; whereby the subject is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs: a third, remedial; whereby a method is pointed out to recover a man's private rights, or redress his private wrongs: to which may be added a fourth, usually termed the *sanction*, or *vindictory* branch of the law; whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty.

With regard to the first of these, the *declaratory* part of the municipal law, this depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislator. This doctrine, which before was slightly touched, deserves a more particular explication. Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural *duties* (such as, for instance, the worship of God, the maintenance of children, and the like) receive any stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes and misdemeanors, that are forbidden by the superior laws, and therefore styled *mala in se*, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only, as was before observed, in subordination to the great lawgiver, transcribing and publishing his precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong.

*55] *But, with regard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life. Thus our own common law has declared, that the goods of

the wife do instantly upon marriage become the property and right of the husband;⁹ and our statute law has declared all monopolies a public offence: yet that right, and this offence, have no foundation in nature, but are merely created by the law, for the purposes of civil society. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct. Thus, for instance, in civil duties; obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances, or to what degree they shall be obeyed, it is the province of human laws to determine. And so, as to injuries or crimes, it must be left to our own legislature to decide, in what cases the seizing another's cattle shall amount to a trespass or a theft; and where it shall be a justifiable action, as when a landlord takes them by way of distress for rent.

Thus much for the *declaratory* part of the municipal law: and the *directory* stands much upon the same footing; for this virtually includes the former, the declaration being usually collected from the direction. The law that says, "thou shalt not steal," implies a declaration that stealing is a crime. And we have seen (*b*) that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them.

The *remedial* part of a law is so necessary a consequence of the former two, that laws must be very vague and imperfect *without it. For in vain would rights be de- [*56 clared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law. When, for instance, the *declaratory* part of the law has said, "that the field or inheritance, which belonged to Titius's father, is vested by his death

(*b*) See page 43, (side paging).

⁹ This rule of the common law has been changed in a number of the United States by statutes, providing that married women shall have separate control, management, and disposition, to a greater or less extent, of property, whether real or personal, owned by them at the time of marriage, or acquired subsequently by gift, grant, devise, bequest, descent, or otherwise. A similar statute has been recently passed in England. (45 & 46 Vict. ch. 75, 1882.)

in Titius;" and the *directory* part has "forbidden any one to enter on another's property, without the leave of the owner:" if Gaius after this will presume to take possession of the land, the *remedial* part of the law will then interpose its office; will make Gaius restore the possession to Titius, and also pay him damages for the invasion.

With regard to the *sanction* of laws, or the evil that may attend the breach of public duties, it is observed, that human legislators have for the most part chosen to make the sanction of their laws rather *vindictory* than *remuneratory*, or to consist rather in punishments, than in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of all our civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards. Because also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty. And farther, because the dread of evil is a much more forcible principle of human actions than the prospect of good. For which reasons, though a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those civil laws, which enforce and enjoin our duty, do seldom, if ever, propose any privilege or gift to such as obey the law; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of the punishment, or else leaving it to the discretion of the judges, and those who are entrusted with the care of putting the laws in execution.

*57] *Of all the parts of a law the most effectual is the *vindictory*. For it is but lost labor to say, "do this, or avoid that," unless we also declare, "this shall be the consequence of your non-compliance." We must therefore observe that the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.

Legislators and their laws are said to *compel* and *oblige*: not that by any natural violence they so constrain a man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligation; but because, by declaring and exhibiting a penalty against offenders, they bring it to

pass that no man can easily choose to transgress the law ; since, by reason of the impending correction, compliance is in a high degree preferable to disobedience. And, even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty ; for rewards, in their nature, can only *persuade* and *allure* ; nothing is *compulsory* but punishment.

It is true, it hath been holden, and very justly, by the principal of our ethical writers, that human laws are binding upon men's consciences. But if that were the only or most forcible obligation, the good only would regard the laws, and the bad would set them at defiance. And, true as this principle is, it must still be understood with some restriction. It holds, I apprehend, as to *rights* ; and that, when the law has determined the field to belong to Titius, it is matter of conscience no longer to withhold or to invade it. So also in regard to *natural duties*, and such offences as are *mala in se* : here we are bound in conscience ; because we are bound by superior laws, before those human laws were in being, to perform the one and abstain from the other. But in relation to those laws which enjoin only *positive duties*, and forbid only such things as are not *mala in se*, but *mala prohibita* merely, without any intermixture of moral guilt, *58] *annexing a penalty to non-compliance, here I apprehend conscience is no farther concerned, than by directing a submission to the penalty, in case of our breach of those laws : for otherwise the multitude of penal laws in a state would not only be looked upon as an impolitic, but would also be a very wicked thing ; if every such law were a snare for the conscience of the subject. But in these cases the alternative is offered to every man ; "either abstain from this, or submit to such a penalty : " and his conscience will be clear, whichever side of the alternative he thinks proper to embrace. Thus, by the statutes for preserving game, a penalty is denounced against every unqualified person that kills a hare, and against every person who possesses a partridge in August. And so too, by other statutes, pecuniary penalties are inflicted for exercising trades without serving an apprenticeship thereto,¹⁰ for not

¹⁰ This statute, and that for not burying in woolen, were repealed in 1814.

burying the dead in woollen, for not performing the statute work on the public roads, and for innumerable other positive misdemeanors. Now these prohibitory laws do not make the transgression a moral offence, or sin: the only obligation in conscience is to submit to the penalty, if levied.¹¹ It must however be observed, that we are here speaking of laws that are simply and purely penal, where the thing forbidden or enjoined is wholly a matter of indifference, and where the penalty inflicted is an adequate compensation for the civil inconvenience supposed to arise from the offence. But where disobedience to the law involves in it also any degree of public mischief or private injury, there it falls within our former distinction, and is also an offence against conscience.

I have now gone through the definition laid down of a municipal law; and have shown that it is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong;" in the explication of which I have endeavored to interweave a few useful principles concerning the nature of civil government, and the obligation

¹¹ It can hardly be said with strict truth that, because the act prohibited is itself indifferent on moral grounds, the conscience is not concerned in avoiding or refraining from its perpetration, for the violation of such a prohibition might have, in its ulterior consequences, an injurious effect upon public and social welfare, in influencing others to disregard laws forbidding acts which are morally objectionable, and intrinsically pernicious in their tendency; for when the spectacle is presented of a voluntary violation of established laws by good men, this *fact* will be chiefly influential with the evil-disposed, and they will consider little the nature of the law infringed. Another effect would be to lead men to rely upon their own independent opinions as to whether an act prohibited were indifferent or not, and thus the exercise of individual discretion as to when a law should be obeyed, and when not, would weaken the obligatory force of law throughout society, and the sense of legal responsibility. Hence this passage of Blackstone has been often criticised. It seems therefore a reasonable and salutary rule that, where a law is not clearly and positively in conflict with moral duty, so that such conflict would be generally recognized, it is as a matter of conscientious duty to yield obedience to such law when duly established. It is, of course, true that the tribunals by which the law is interpreted and enforced, must impose the prescribed penalty for a violation of law, without regard to the conscientious scruples of those adjudged responsible. And it is a general principle that when a statute imposes a penalty for the commission of an act, the act is impliedly prohibited, though there be no specific words of prohibition in the statute. (See ante, note 2.)

of human laws. Before I conclude this section, it may not be amiss to add a few observations concerning the *interpretation* of laws.

When any doubt arose upon the construction of the Roman laws, the usage was to state the case to the emperor in writing, and take his opinion upon it. This was certainly a bad method of interpretation. To interrogate the legislature to decide particular disputes is not only endless, but affords great room for partiality and oppression. The answers of the emperor were called his rescripts, and these had in succeeding cases the force of perpetual laws; though they ought to be carefully distinguished by every rational civilian from those general constitutions which had only the nature of things for their guide. The emperor Macrinus, as his historian Capitolinus informs us, had once resolved to *abolish these rescripts, and retain only [*59 the general edicts: he could not bear that the hasty and crude answers of such princes as Commodus and Caracalla should be revered as laws. But Justinian thought otherwise, and he has preserved them all. In like manner the canon laws, or decretal epistles of the popes, are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals.

The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law. Let us take a short view of them all:—

1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorf which forbade a layman to *lay hands* on a priest, was adjudged to extend to him, who had hurt a priest with a weapon. Again, terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. So in the Act of Settlement, where the crown of England is limited “to the princess Sophia, and the heirs of her body, being protestants,” it becomes necessary to call in the assistance of lawyers, to ascertain the precise idea of the words “*heirs of her body*,” which, in a legal sense, comprise only certain of her lineal descendants.

*60] *2. If words happen to be still dubious, we may establish their meaning from the *context*, with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point.¹² Thus, when the law of England declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is:¹³ and, when the common law censures simoniacal contracts it affords great light to the subject to consider what the canon law has adjudged to be simony.

3. As to the *subject-matter*, words are always to be understood as having a regard thereto, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. Thus, when a law of our Edward III. forbids all ecclesiastical persons to purchase *provisions at Rome*, it might seem to prohibit the buying of grain and other victual; but, when we consider that the statute was made to repress the usurpations of the Papal See, and that the nominations to benefices by the Pope were called *provisions*, we shall see that the restraint is intended to be laid upon such provisions only.

4. As to the *effects and consequences*, the rule is, that where

¹² It is a general rule of construction that statutes *in pari materia* (i. e. upon the same subject) are to be construed with reference to each other, so that if there be any ambiguity or uncertainty in one, this may be resolved by comparison with the other. (*Smith v. People*, 47 N. Y. 330; *U. S. v. Freeman*, 3 How. U. S. 556.) So title, preamble, contemporaneous construction, etc., may be considered. (*Yazoo, &c. R. Co. v. Thomas*, 132 U. S. 174; *U. S. v. Philbrick*, 120 U. S. 52.)

¹³ Benefit of clergy, in the ancient criminal law of England, was the privilege granted to the clergy, of exemption from the process of the secular courts when charged with felonious crimes, and operated to render them amenable in such cases only to the church authorities, and thus to relieve them from capital punishment. This exemption was also extended to the officers and clerks of the church and to all persons who could read, since in those times of ignorance those who could read were mainly in the service of the church. When learning became more general, laymen who could read were allowed the privilege only once, and were then branded in the left thumb; whipping, fine and imprisonment, were afterwards substituted for branding. Benefit of clergy was abolished by statute in 1828. (See *post*, pp. 1030-1034.)

words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf, which enacted "that whoever drew blood in the streets should be punished with the utmost severity," was held after long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit.

*5. But, lastly, the most universal and effectual way [*61 of discovering the true meaning of a law, when the words are dubious, is by considering the ~~reason~~ and *spirit* of it; or the cause which moved the legislature to enact it. For when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the treatise inscribed to Herennius. There was a law, that those who in a storm forsook the ship should forfeit all property therein; and that the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who, by reason of his disease, was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel; but this is a merit which he could never pretend to, who neither staid in the ship upon that account, nor contributed anything to its preservation.¹⁴ *should have rescued*

¹⁴ Every statute is presumed to have a reasonable intendment, and the strict letter of the statute must yield to the spirit when the legislative intent is so manifest. Thus, where a statute made it the duty of railroads to erect and maintain fences on the sides of their roads, and one section provided "that so long as such fences shall not be made, and when not in good repair, such railroad corporation shall be liable for damages which shall be done by the agents or engines of such corporation, to cattle, etc., thereon," it was held that the effect of the words, "when not in good repair," was not, as the literal language would imply, to render railroad companies absolutely liable in every conceivable case where their fences were not, at the time of the injury, in proper repair, but only when the defect was attributable to negligence. Otherwise, it was said, they would be liable in all cases where injury was occasioned by the road being out of repair, whether this were caused by tempest, by flood, or by the wrongful acts of third persons, though

From this method of interpreting laws, by the reason of them, arises what we call equity, which is thus defined by Grotius: "the correction of that wherein the law (by reason of its universality), is deficient." For since in laws all cases cannot be foreseen or expressed, it is necessary that, when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed. And these are the cases which, according to Grotius, "*lex non exacte definit, sed arbitrio boni viri permittit.*"

Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no establish-
 *62] ed *rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law.¹⁵ And, on the other hand, the liberty of considering all

there had been no opportunity to repair. (*Murray v. N. Y. Cent. R. Co.*, 3 Abb. Dec. 339; see *U. S. v. Kirby*, 7 Wall. 482. A remarkable case is *Riggs v. Palmer*, 115 N. Y. 506.)

²⁵ There have been from an early period, in the history of English jurisprudence, courts having a peculiar jurisdiction and modes of procedure, which are termed courts of equity as distinguished from courts of law. This system of equity jurisprudence grew out of an attempt to repair the deficiencies of the strict legal methods. The only relief obtainable in a common-law court was the recovery of specific real or personal property, or pecuniary damages; and there were also peculiar technical methods of pleading requisite, and causes were heard and determined in the first instance by juries. Courts of equity afforded other modes of relief and remedy, as by granting injunctions to prevent injuries, by enforcing the specific performance of contracts, by requiring the delivery or cancellation of instruments, &c. The mode of trial was also different, there being no juries; and the method of proof was, in certain respects, peculiar. The jurisdiction of courts of equity was in some cases concurrent with that of the common-law courts; in other cases, exclusive, as in cases of trust. These differences still continue in the main, though by a recent English statute the legal methods of procedure have been assimilated in a measure to the equitable, and the common-law courts are empowered to apply the doctrines of equity jurisprudence in certain classes of cases. But there is the same adherence to precedents in courts of equity as in courts of law; so that when Blackstone in the text uses the word "equity" in an enlarged, general sense, and says that "there can be no established rules and fixed precepts of equity laid down, &c.," he must not be understood as referring to the principles of equity jurisprudence, strictly so-called, as administered in courts of equity. As he himself says elsewhere, "the system of our courts of equity is a

cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much more desirable for the public good than equity without law; which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.

SECTION. II.

[BL. COMM.—INTRODUCTION.—SECT. III.]

Of the Laws of England.

THE municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds: the *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law.

The *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law properly so called; but also the *particular customs* of certain parts of the kingdom; and likewise

labored, connected system, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection." (see *post* page 824.)

The English distinction between legal and equitable procedure and jurisdiction was also adopted in the United States. But while in some States there are separate courts of law and of equity, in others the administration of principles of equity and of law is committed to the same tribunals. The present tendency of legislation is to do away with the mere formal differences between the two systems, and the diverse methods of practice, while the substantial differences in regard to remedy and extent of jurisdiction are still retained. In like manner, those States in which there were formerly distinct courts of law and of equity are now generally giving these diverse powers and functions to the same courts. Such changes have been made in New York and a number of the other States. (See *Basey v. Gallagher*, 20 Wall. 670.)

those *particular laws*, that are by custom observed only in certain courts and jurisdictions.

When I call these parts of our law *leges non scriptæ*, I would not be understood as if all those laws were at present merely *oral*, or communicated from the former ages to the present solely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional, for this plain reason, because the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallic druids committed all their laws as well as learning to memory; and it is said of the primitive Saxons here, as well as their brethren on the continent, that *leges sola memoria et usu retinebant*. But, with us at present, the monuments and evidences of our legal customs are contained in the records of the several courts of *64] justice, in books of *reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of the highest antiquity. However, I therefore style these parts of our law *leges non scriptæ*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom. In like manner as Aulus Gellius defines *jus non scriptum* to be that, which is "*tacito et illiterato hominum consensu et moribus expressum*."

Our ancient lawyers, and particularly Fortescue, insist with abundance of warmth that these customs are as old as the primitive Britons, and continued down, through the several mutations of government and inhabitants, to the present time, unchanged and unadulterated. This may be the case as to some; but in general, as Mr. Selden in his notes observes, this assertion must be understood with many grains of allowance; and ought only to signify, as the truth seems to be, that there never was any formal exchange of one system of laws for another; though doubtless, by the intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and the Normans, they must have insensibly introduced and incorporated many of their own customs with those that were before established; thereby, in all probability, improving the texture and wisdom of the whole

by the accumulated wisdom of divers particular countries. Our laws, saith Lord Bacon, are mixed as our language; and, as our language is so much the richer, the laws are the more complete.

And indeed our antiquaries and early historians do all positively assure us, that our body of laws is of this compounded nature. For they tell us that in the time of Alfred the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile his *Dome-Book*, or *Liber Fudicialis*, for the general use of the whole kingdom.

*This book is said to have been extant so late as the reign [*65 of king Edward the Fourth, but is now unfortunately lost. It contained, we may probably suppose, the principal maxims of the common law, the penalties for misdemeanors, and the forms of judicial proceedings. Thus much may at least be collected from that injunction to observe it, which we find in the laws of king Edward the elder, the son of Alfred, "*Omnibus qui reipublicæ præsumunt etiam atque etiam mando, ut omnibus æquos se præbeant iudices, perinde ac in judiciali libro (Saxonice dom-beo) scriptum habetur: nec quicquam formident quin jus commune (Saxonice foierihce) audacter libereque dicant.*"

But the irruption and establishment of the Danes in England, which followed soon after, introduced new customs, and caused this code of Alfred in many provinces to fall into disuse, or at least to be mixed and debased with other laws of a coarser alloy; so that, about the beginning of the eleventh century, there were three principal systems of laws prevailing in different districts: 1. The *Mercen-Lage*, or Mercian laws, which were observed in many of the midland counties, and those bordering on the principality of Wales, the retreat of the ancient Britons; and therefore very probably intermixed with the British or Druidical customs. 2. The *West-Saxon Lage*, or laws of the West Saxons, which obtained in the counties to the south and west of the island, from Kent to Devonshire. These were probably much the same with the laws of Alfred above mentioned, being the municipal law of the far most considerable part of his dominions, and particularly including Berkshire, the seat of his peculiar residence. 3. The *Dane Lage*, or Danish law, the very name of which speaks its original and composition. This was principally maintained in the rest of the midland counties, and also on the eastern coast, the part most exposed to the visits of that

piratical people. As for the very northern provinces, they were at that time under a distinct government.

***66]** *Out of these three laws, Roger Hoveden and Ranulphus Cestrensis inform us, king Edward the Confessor, extracted one uniform law, or digest of laws, to be observed throughout the whole kingdom; though Hoveden, and the author of an old manuscript chronicle assures us likewise that this work was projected and begun by his grandfather King Edgar. And indeed a general digest of the same nature has been constantly found expedient, and therefore put in practice by other great nations, which were formed from an assemblage of little provinces, governed by peculiar customs, as in Portugal, under King Edward, about the beginning of the fifteenth century. In Spain under Alonzo X. who, about the year 1250, executed the plan of his father St. Ferdinand, and collected all the provincial customs into one uniform law, in the celebrated code entitled *Las Partidas*. And in Sweden, about the same era, when a universal body of common law was compiled out of the particular customs, established by the laghman of every province, and entitled the *land's lagh*, being analogous to the *common law* of England.

Both these undertakings of King Edgar and Edward the Confessor seem to have been no more than a new edition, or fresh promulgation, of Alfred's code or dome-book, with such additions and improvements as the experience of a century and a half had suggested; for Alfred is generally styled by the same historians the *legum Anglicanarum conditor*, as Edward the Confessor is the *restitutor*. These, however, are the laws which our histories so often mention under the name of the laws of Edward the Confessor, which our ancestors struggled so hardly to maintain, under the first princes of the Norman line; and which subsequent princes so frequently promised to keep and restore, as the most popular act they could do, when pressed by foreign emergencies or domestic discontents. These are the laws that so vigorously ***67]** withstood *the repeated attacks of the civil law; which established in the twelfth century a new Roman empire over most of the states of the continent; states that have lost, and perhaps upon that account, their political liberties; while the free constitution of England, perhaps upon the same account, has been rather improved than debased. These, in short, are the laws which gave rise and origin to that collection of *maxims*

and customs which is now known by the name of the common law; a name either given to it in contradistinction to other laws, as the statute law, the civil law, the law merchant, and the like; or, more probably, as a law common to all the realm, the *jus commune*, or *folcright*, mentioned by king Edward the elder, after the abolition of the several provincial customs and particular laws before mentioned.

But though this is the most likely foundation of this collection of maxims and customs, yet the maxims and customs, so collected, are of higher antiquity than memory or history can reach: nothing being more difficult than to ascertain the precise beginning and first spring of an ancient and long-established custom. Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, {time whereof the memory of man runneth not to the contrary.} This it is that gives it its weight and authority: and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom.

This unwritten, or common law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs: which, for the most part, affect only the inhabitants of particular districts. 3. Certain particular laws; which, by custom, are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

* I. As to general customs, or the common law, [*68 properly so called; this is that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed.¹ This, for the most part, settles the course in

¹ "The common-law includes those principles, usages, and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature." (Kent's Comm. i., p. 471.) The common-law of England, as it existed at the time of the Revolution, was adopted in many of the States by Constitutional provisions or legislative enactments, or was assumed in certain States as the basis of their law and as authoritative upon their courts. Thus it was declared by the Constitution of New York, of 1777; that such parts of the common-law of England and of the statute law of England and Great Britain, as together with the acts of the Colonial legislature,

which lands descend by inheritance ; the manner and form of acquiring and transferring property ; the solemnities and obligation of contracts ; the rules of expounding wills, deeds, and acts of parliament ; the respective remedies of civil injuries ; the several species of temporal offences ; with the manner and degree of punishment ; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example, that there shall be four superior courts of record, the Chancery, the King's Bench, the Common Pleas, and the Exchequer ;—that the eldest son alone is heir to his ancestor ;—that property may be acquired and transferred by writing ;—that a deed is of no validity unless sealed and delivered ;—that wills shall be construed more favourably, and deeds more strictly ;—that money lent upon bond is recoverable by action of debt ;—that breaking the public peace is an offence, and punishable by fine and imprisonment ;—all these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law for their support.

Some have divided the common law into two principal grounds or foundations : 1. Established customs ; such as that, where there are three brothers, the eldest brother shall be heir to the second, in exclusion of the youngest : and 2. Established rules and maxims ; as, “ that the king can do no wrong, that no man shall be bound to accuse himself,” and the like. But I

formed the law of the Colony on the 19th of April, 1775, should continue to be the law of the State. Other States fixed upon other dates. The effect, therefore, is that the decisions of the English courts prior to the date prescribed are as binding in the State fixing such date as the decisions of its own courts, so far as unmodified by subsequent legislation or adjudication. But decisions rendered in one State are in no sense authoritative upon the courts of other States, though frequently referred to or quoted by way of argument or illustration. The United States, considered as a nation, has no common-law ; and the jurisdiction of the U. S. courts is entirely based upon the Constitution and upon statutes which Congress has, by the Constitution, power to enact. The decisions of these courts upon questions involving the construction of the U. S. Constitution are binding upon the courts of the several States, but not generally when rendered upon commercial questions. There are many classes of cases over which the U. S. courts have exclusive jurisdiction, such as admiralty causes, patents, copyrights, questions of revenue, &c. It should be stated that the law of Louisiana is not based upon the common-law of England, but upon the civil law.

take these to be one and the same thing. For the authority of these maxims rests entirely upon general reception and usage : and the only method of proving, that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it.

* But here a very natural, and very material question [*69 arises : how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositories of the laws ; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. The knowledge of that law is derived from experience and study ; from the "*viginti annorum lucubrationes*," which Fortescue mentions ; and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of *records*, in public repositories set apart for that particular purpose ; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance. And therefore, even so early as the Conquest, we find the "*præteritorum memoria eventorum*" reckoned up as one of the chief qualifications of those, who were held to be "*legibus patriæ optime instituti*." For it is an established rule to abide by former precedents, where the same points come again in litigation : as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion ; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments : he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land ; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason ; * much more if it be clearly contrary [*70

to the Divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded. And it hath been an ancient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration.² To illustrate this doctrine by

² The rule that established precedents should be adhered to and followed, although it is a general principle wherever the common-law is in force, is not so rigidly observed as to prevent courts of appellate jurisdiction from overruling previous decisions which are deemed to be erroneous and unreasonable. It is very common to overrule the decisions of inferior courts, and many decisions of the highest courts of the various States and in England, have also been subsequently overruled by the same tribunals in which they were originally rendered. But the force of adherence to precedent is nevertheless very strong, and will sometimes cause an established principle of law which has been long acquiesced in, to be firmly maintained, though it may appear unreasonable and injurious in its tendency. A change in the law must then be made, if at all, by statute. But the principle of *stare decisis* (to adhere to previous decisions) is to this extent absolutely controlling, that courts of inferior jurisdiction must be governed strictly by the decisions of the superior courts of the same State, however unjust and absurd such precedents may seem to be. But a decision previously rendered is only so far binding as a precedent, as it was a determination of the exact

examples. It has been determined, time out of mind, that a brother of the half blood shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the king, or other superior lord. Now this is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions; and therefore can never be departed from by any modern judge without a breach of his oath and *the law.⁸ [*71 For herein there is nothing repugnant to natural justice; though the artificial reason of it, drawn from the feudal law, may not be quite obvious to everybody. And therefore, though a modern judge, on account of a supposed hardship upon the half brother, might wish it had been otherwise settled, yet it is not in his power to alter it. But if any court were now to determine, that an elder brother of the half blood might enter upon and seize any lands that were purchased by his younger brother, no subsequent judges would scruple to declare that such prior determination was unjust, was unreasonable, and therefore was *not law*. So that *the law*, and the *opinion of the judge*, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law. Upon the whole, however, we may take it as a general rule, "that the decisions of courts of justice are the evidence of what is common law," in the same manner as, in the civil law, what the emperor had once determined was to serve for a guide for the future.

The decisions therefore of courts are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of *reports* which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides and the reasons the

question at issue in the cause litigated; and statements of a collateral or inferential character, made in the opinion of the court, or adduced for the sake of illustration or explanation, are in no way authoritative. These are usually termed *dicta* (sayings) or *obiter dicta* (sayings by the way.) Therefore, in reading the reports of cases it is necessary to carefully discriminate between the actual point decided, and the *dicta* of the court or judge. (See *Oakley v. Aspinwall*, 13 N. Y. 500; Kent's Comm. i. p. 476; 103 U. S. 118.)

⁸ This rule has been repealed in England by statute.

court gave for its judgment ; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain, the records, which always, in matters of consequence and nicety, the judges direct to be searched. The reports are extant in a regular series from the reign of King Edward the Second inclusive ; and, from his time to that of Henry *72] the *Eighth, were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published *annually*, whence they are known under the denomination of the *year books*. And it is much to be wished that this beneficial custom had, under proper regulations, been continued to this day : for, though King James the First, at the instance of Lord Bacon, appointed two reporters with a handsome stipend for this purpose, yet that wise institution was soon neglected, and from the reign of Henry the Eighth to the present time this task has been executed by many private and contemporary hands ;⁴ who sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination. Some of the most valuable of the ancient reports are those published by Lord Chief-Justice Coke ; a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However, his writings are so highly esteemed, that they are generally cited without the author's name (*a*).

⁴ There is now an incorporated association of law reporting in England, under whose auspices the reports of decisions rendered in the superior courts, are published in a uniform series. This is composed of leading members of the bar, and the reports are prepared with great care and judgment, and are of much value. In some states of this country, an official reporter is appointed to report court decisions, while in others this is done by volunteer reporters, the privilege being open to any who desire to undertake such labor.

A reporter prepares an abstract of the principle of law established by the decision, which is prefixed to the report, and is termed the "head-note" or "syllabus." He also prepares usually a statement of the facts of the case decided, which is placed after the head-note, and before the opinion of the judge or court. The word "*Held*" in a head-note denotes the points decided ; "*It seems*" or "*Seemle*," denote *dicta*.

(*a*) His reports, for instance, are styled, *κατ' ἐξοχὴν*, *the reports* ; and, in quoting them, we usually say, 1 or 2 Rep. not 1 or 2 Coke's Rep. as in citing other authors. The reports of Judge Croke are also cited in a peculiar man-

Besides these reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanvil and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert, and Staundforde, with some others of ancient date; whose treatises are cited as authority, and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles. One of the last of these methodical writers in point of time, whose works are of any intrinsic authority in the courts of justice, and do not entirely depend on the strength of their quotations from older authors, is the *same learned judge we have just mentioned, Sir Edward Coke; who hath written four volumes of institutes, as he is pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive comment upon a little excellent treatise of tenures, compiled by Judge Littleton in the reign of Edward the Fourth. This comment is a rich mine of valuable common law learning, collected and heaped together from the ancient reports and year books, but greatly defective in method (*b*). The second volume is a comment upon many old acts of parliament, without any systematical order; the third a more methodical treatise of the pleas of the crown; and the fourth an account of the several species of courts (*c*).

And thus much for the first ground and chief corner stone of the laws of England, which is general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.

And thus much for the second ground and chief corner stone, by the names of those princes, in whose reigns the cases reported in his three volumes were determined; *viz.*, Queen Elizabeth, King James, and King Charles the First, as well as by the number of each volume. For sometimes we call them 1, 2, and 3 Cro. but more commonly Cro. Eliz., Cro. Jac., and Cro. Car.

(*b*) It is usually cited either by the name of Co. Litt. or as 1 Inst.

(*c*) These are cited as 2, 3, or 4 Inst. without any author's name. An honorary distinction, which, we observed, is paid to the works of no other writer; the generality of reports and other tracts being quoted in the name of the compiler, as 2 Ventris, 4 Leonard, 1 Siderfin, and the like.

The Roman law, as practised in the times of its liberty, paid also a great regard to custom : but not so much as our law : it only then adopting it, when the written law was deficient. Though the reasons alleged in the digest will fully justify our practice in making it of equal authority with, when it is not contradicted by, the written law. "For, since (says Julianus,) the written law binds us for no other reason but because it is approved by the judgment of the people, therefore those laws which the people *74] have approved without writing ought also to bind everybody. For where is the difference, whether the people declare their *assent to a law by suffrage, or by a uniform course of acting accordingly?" Thus did they reason while Rome had some remains of her freedom ; but, when the imperial tyranny came to be fully established, the civil laws speak a very different language. "*Quod principi placuit legis habet vigorem, cum populus ei et in eum omne suum imperium et potestatem conferat,*" says Ulpian : "*Imperator solus et conditor et interpres legis existimatur,*" says the code. And again, "*sacrilegii instar est rescripto principis obviari.*" And indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom ; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people.

II. The second branch of the unwritten laws of England are particular customs, or laws, which affect only the inhabitants of particular districts.

These particular customs, or some of them, are without doubt the remains of that multitude of local customs before mentioned, out of which the common law, as it now stands, was collected at first by King Alfred, and afterwards by King Edgar and Edward the Confessor : each district mutually sacrificing some of its own special usages, in order that the whole kingdom might enjoy the benefit of one uniform and universal system of laws. But for reasons that have been now long forgotten, particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large : which privilege is confirmed to them by several acts of parliament.

Such is the custom of gavelkind in Kent, and some other parts of the kingdom (though perhaps it was also general till the Nor-

man conquest), which ordains, among other things, *that [*75 not the eldest son only of the father shall succeed to his inheritance, but all the sons alike: and that, though the ancestor be attainted and hanged, yet the heir shall succeed to his estate, without any escheat to the lord. Such is the custom that prevails in divers ancient boroughs, and therefore called borough-English, that the youngest son shall inherit the estate, in preference to all his elder brothers. Such is the custom in other boroughs that a widow shall be entitled, for her dower, to all her husband's lands; whereas, at the common law, she shall be endowed of one-third part only. Such also are the special and particular customs of manors, of which every one has more or less, and which bind all the copyhold and customary tenants that hold of the said manors. Such likewise is the custom of holding divers inferior courts, with power of trying causes, in cities and trading towns, the right of holding which, when no royal grant can be shown, depends entirely upon immemorial and established usage. Such, lastly, are many particular customs within the city of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters. All these are contrary to the general law of the land, and are good only by special usage; though the customs of London are also confirmed by act of parliament.

To this head may most properly be referred a particular system of customs used only among one set of the king's subjects, called the custom of merchants, or *lex mercatoria*: which, however different from the general rules of the common law, is yet ingrafted into it, and made a part of it; being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions: for it is a maxim of law, that "*cuilibet in sua arte credendum est.*"

The rules relating to particular customs regard either the *proof* of their existence; their *legality* when proved; or their usual method of *allowance*.

And first we will consider the rules of *proof*.

*As to gavelkind, and borough-English, the law takes [*76 particular notice of them, and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded, and as well the existence of such customs must be

shown, as that the thing in dispute is within the custom alleged. The trial in both cases (both to show the existence of the custom, as, "that in the manor of Dale lands shall descend only to the heirs male, and never to the heirs female;" and also to show "that the lands in question are within that manor") is by a jury of twelve men, and not by the judges; except the same particular custom has been before tried, determined, and recorded in the same court.

The customs of London differ from all others in point of trial: for, if the existence of the custom be brought in question, it shall not be tried by a jury, but by certificate from the lord mayor and aldermen by the mouth of their recorder; unless it be such a custom as the corporation is itself interested in, as a right of taking toll, &c., for then the law permits them not to certify on their own behalf.⁵

⁵ These "particular customs or laws" to which Blackstone refers, "which affect only the inhabitants of particular districts," and are therefore entirely local and exist irrespective of contract, must be distinguished from the customs or usages of trade, or business, which are generally allowed to be proved in court in order to explain or modify the terms of contracts or transactions into which parties have entered. Most of the customs enumerated in the text are exclusively English, and there are none corresponding to them existing in the United States. There is, however, a local usage existing in some States, which is in some respects similar to them, by which a tenant for years has a right to remove "away-going crops," as they are termed, at the expiration of his lease, contrary to the general rule that such tenants have no emblements. But the usages of *trade*, or *business*, are numerous and diverse; and it is a general rule that parties are presumed to contract in reference to a uniform, continuous, and well-settled usage pertaining to the matters as to which they enter into agreement, where such usage is not in opposition to well-settled principles of law and is not unreasonable. Thus where work was done by carpenters at so much a day, proof was received that by a usage in that trade a working day was ten hours long. (*Hinton v. Locke*, 5 Hill, 437. See also *Ford v. Tirrell*, 9 Gray, 401.) So it may be shown by proof of established usage, that words or expressions are employed in particular trades with peculiar significations. (*Robinson v. U. S.*, 13 Wall. 363; *Page v. Cole*, 120 Mass. 37.) It is not necessary to prove that such usages have existed any particular length of time, but only that they have been so uniformly acted upon and so commonly and continuously recognized in a particular form of business that parties must be presumed to contract in reference thereto. They are allowed to affect the construction of an agreement because they are deemed to be within the contemplation of the parties and thus to enter into the terms of the contract. But this presumption in regard to particular usages is not conclusive, and may be rebutted by proof that one of the contracting

When a custom is actually proved to exist, the next inquiry is into the *legality* of it; for, if it is not a good custom, it ought to be no longer used; "*malus usus abolendus est*" is an established maxim of the law. To make a particular custom good, the following are necessary requisites.

1. That it have been used so long, that the memory of man runneth not to the contrary. So that, if, any one can show the beginning of it, it is no good custom.⁶ For which reason no custom can prevail against an express act of *parliament, since [*77 the statute itself is a proof of a time when such a custom did not exist.

2. It must have* been *continued*. Any interruption would cause a temporary ceasing: The revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right*; for an interruption of the *possession* only, for ten or twenty years, will not destroy the custom. As if the inhabitants of a parish have a customary right of watering

parties was ignorant of such usage. (49 N. Y. 464; 120 U. S. 499.) But a custom or usage must be *reasonable* in order that it may be permitted to control or qualify the stipulations of a contract. If it be unreasonable, evidence of it will be rejected. Thus in a case where there was a sale of sheep, and the seller before delivery sheared them and kept the wool, it was held incompetent to prove that by a local custom in the county where the transaction took place, the wool of sheep in such cases does not go to the purchaser. (*Groat v. Gile*, 51 N. Y. 431. See also *Wheeler v. Newbould*, 16 N. Y. 392; *Partridge v. Ins. Co.*, 15 Wall. 573.) So if there is no uncertainty as to the terms of a contract, usage cannot be proved to contradict or qualify its provisions. Usage is only resorted to for the purpose of ascertaining with greater certainty the intent of the parties; not to contravene their express stipulations. (*Barnard v. Kellogg*, 10 Wall. 383; *Collender v. Dinsmore*, 55 N. Y. 200.) So evidence of a usage of trade is inadmissible to contradict a settled rule of commercial law. (*Markham v. Faudon*, 41 N. Y. 235. See further 8 N. Y. 190; 8 How. U. S. 83; 23 id. 420; 115 Mass. 514.)

⁶ The period of legal memory was deemed in English law to date from the first year of the reign of Richard I. (1189); and when it was said that a custom or privilege must have been exercised from time immemorial, the meaning was that its enjoyment must not appear to have commenced at a later date. But by lapse of time this period became too remote for tracing the origin of such privileges; and it was afterwards held, that from proof of the enjoyment of a custom for twenty years, the jury were justified in finding that the custom had existed immemorially. This matter is now regulated in England by statute (*Broom Com. Law*, p. 12. See *Ocean Ass'n. v. Brinley*, 34 N. J. Eq. 438)

their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove; but if the *right* be any how discontinued for a day, the custom is quite at an end.

3. It must have been *peaceable*, and acquiesced in; not subject to contention and dispute. For as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting.

4. Customs must be *reasonable*; or rather, taken negatively, they must not be unreasonable. Which is not always, as Sir Edward Coke says, to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad, for peradventure the landlord will never put in his, and then the tenants will lose all their profits.

*78] *5. Customs ought to be *certain*. A custom, that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? but a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. A custom to pay two pence an acre in lieu of tithes, is good; but to pay sometimes two-pence, and sometimes three-pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom, to pay a year's improved value for a fine on a copyhold estate, is good; though the value is a thing uncertain: for the value may at any time be ascertained; and the maxim of law is, *id certum est, quod certum reddi potest*.

6. Customs, though established by consent, must be (when established) *compulsory*; and not left to the option of every man, whether he will use them or no. Therefore a custom, that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom, that every man is to contribute

thereto at his own pleasure, is idle and absurd, and indeed no custom at all.

7. Lastly, customs must be *consistent* with each other: one custom cannot be set up in *opposition* to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden; the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom.

Next, as to the *allowance* of special customs. Customs, in derogation of the common law, must be construed strictly. Thus, by the custom of gavelkind, an infant of fifteen years *may, [*79 by one species of conveyance, (called a deed of feoffment,) convey away his lands in fee simple, or for ever. Yet this custom does not empower him to use any other conveyance, or even to lease them for seven years: for the custom must be strictly pursued. And, moreover, all special customs must submit to the king's prerogative. Therefore, if the king purchases lands of the nature of gavelkind, where all the sons inherit equally, yet, upon the king's demise, his eldest son shall succeed to those lands alone. And thus much for the second part of the *leges non scriptæ*, or those particular customs which affect particular persons or districts only.

III. The third branch of them are those peculiar laws, which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these I understand the civil and canon laws.

It may seem a little improper at first view to rank these laws under the head of *leges non scriptæ*, or unwritten laws, seeing they are set forth by authority in their pandects, their codes, and their institutions; their councils, decrees, and decretals; and enforced by an immense number of expositions, decisions, and treatises of the learned in both branches of the law. But I do this, after the example of Sir Matthew Hale, because it is most plain, that it is not on account of their being *written* laws that either the canon law, or the civil law, have any obligation within this kingdom; neither do their force and efficacy depend upon their own in-

trinsic authority, which is the case of our written laws, or acts of parliament. They bind not the subjects of England, because their materials were collected from popes or emperors ; were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here ; for the legislature of England doth not, nor ever did, recognize any foreign power as superior or equal to it in this kingdom, or as having the right to give law to any, the meanest of its subjects. But all the *80] *strength that either the papal or imperial laws have obtained in this realm, or indeed in any other kingdom in Europe, is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts ; and then they form a branch of the *leges non scriptæ*, or customary laws ; or else because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scriptæ*, or statute law. This is expressly declared in those remarkable words of the statute 25 Hen. VIII. c. 21, addressed to the king's royal majesty : " This your grace's realm, recognizing no superior under God but only your grace, hath been and is free from subjection to any man's laws, but only to such as have been devised, made, or ordained *within* this realm, for the wealth of the same ; or to such other, as, by sufferance of your grace and your progenitors, the people of this your realm have taken at their free liberty, by their own consent, to be used among them ; and have bound themselves by long use and custom to the observance of the same ; not as to the observance of the laws of any foreign prince, potentate, or prelate ; but as to the *customed* and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and customs ; and none otherwise."

By the civil law, absolutely taken, is generally understood the civil or municipal law of the Roman empire, as comprised in the institute, the code, and the digest of the emperor Justinian, and the novel constitutions of himself and some of his successors. Of which, as there will frequently be occasion to cite them, by way of illustrating our own laws, it may not be amiss to give a short and general account.

The Roman law (founded first upon the regal constitutions of their ancient kings, next upon the twelve tables of the *decem-*

viri, then upon the laws or statutes enacted by the senate or people, the edicts of the prætor, and the *responsa prudentum*, or opinions of learned lawyers, and lastly upon the imperial decrees, or constitutions of successive emperors,) had grown [*81 to so great a bulk, or, as Livy expresses it, "*tam immensus aliarum super alias acervatarum legum cumulus*," that they were computed to be many camels' load by an author who preceded Justinian. This was in part remedied by the collections of three private lawyers, Gregorius, Hermogenes, and Papirius; and then by the emperor Theodosius the younger, by whose orders a code was compiled A. D. 438, being a methodical collection of all the imperial constitutions then in force: which Theodosian code was the only book of civil law received as authentic in the western part of Europe till many centuries after; and to this it is probable that the Franks and Goths might frequently pay some regard, in framing legal constitutions for their newly erected kingdoms: for Justinian commanded only in the eastern remains of the empire; and it was under his auspices that the present body of civil law was compiled and finished by Tribonian and other lawyers, about the year 533.

This consists of, 1. The institutes, which contain the elements or first principles of the Roman law, in four books. 2. The digests, or pandects, in fifty books; containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A new code, or collection of imperial constitutions, in twelve books; the lapse of a whole century having rendered the former code of Theodosius imperfect. 4. The novels, or new constitutions, posterior in time to the other books, and amounting to a supplement to the code; containing new decrees of successive emperors, as new questions happened to arise. These form the body of Roman law, or *corpus juris civilis*, as published about the time of Justinian; which, however, fell soon into neglect and oblivion, till about the year 1130, when a copy of the digests was found at Amalfi, in Italy; which accident, concurring with the policy of the Roman ecclesiastics, suddenly gave new vogue and authority to the civil law, introduced it into several nations, and *occasioned that mighty inundation of vol- [*82 uminous comments, with which this system of law, more than any other, is now loaded.

The canon law is a body of Roman ecclesiastical law, relative

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to such matters as that church either has, or pretends to have, the proper jurisdiction over. This is compiled from the opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the holy see; all of which lay in the same disorder and confusion as the Roman civil law, till, about the year 1151, one Gratian, an Italian monk, animated by the discovery of Justinian's pandects, reduced the ecclesiastical constitutions also into some method, in three books, which he entitled *Concordia Discordantium Canonum*, but which are generally known by the name of *Decretum Gratiani*. These reached as low as the time of Pope Alexander III. The subsequent papal decrees, to the pontificate of Gregory IX., were published in much the same method, under the auspices of that pope, about the year 1230, in five books, entitled *Decretalia Gregorii Noni*. A sixth book was added by Boniface VIII. about the year 1298, which is called *Sextus Decretalium*. The Clementine constitutions, or decrees of Clement V. were in like manner authenticated in 1317, by his successor, John XXII., who also published twenty constitutions of his own, called the *Extravagantes Joannis*, all of which in some measure answer to the novels of the civil law. To these have been since added some decrees of later popes, in five books, called *Extravagantes Communes*; and all these together, Gratian's decree, Gregory's decretals, the sixth decretal, the Clementine constitutions, and the extravagants of John and his successors, form the *corpus juris canonici*, or body of the Roman canon law.

Besides these pontifical collections, which, during the times of popery, were received as authentic in this island, as well as in other parts of Christendom, there is also a kind of natural canon law, composed of *legatine* and *provincial* constitutions, and adapted only to the exigencies of this church *and kingdom. The *legatine* constitutions were ecclesiastical laws, enacted in national synods, held under the cardinals Otho and Othobon. legates from Pope Gregory IX. and Pope Clement IV. in the reign of King Henry III. about the years 1220 and 1268. The *provincial* constitutions are principally the decrees of provincial synods, held under divers archbishops of Canterbury, from Stephen Langton, in the reign of Henry III., to Henry Chichele, in the reign of Henry V.; and adopted also by the province of York in the reign of Henry VI. At the dawn of the reforma-

tion, in the reign of King Henry VIII., it was enacted in parliament that a review should be had of the canon law; and, till such review should be made, all canons, constitutions, ordinances, and synodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, should still be used and executed. And, as no such review has yet been perfected, upon this statute now depends the authority of the canon law in England.

As for the canons enacted by the clergy under James I. in the year 1603, and never confirmed in parliament, it has been solemnly adjudged upon the principles of law and the constitution, that where they are not merely declaratory of the ancient canon law, but are introductory of new regulations, they do not bind the laity, whatever regard the clergy may think proper to pay them.

There are four species of courts in which the civil and canon laws are permitted, under different restrictions, to be used: 1. The courts of the archbishops and bishops, and their derivative officers, usually called in our law courts Christian, *curiæ Christianitatis*, or the ecclesiastical courts. 2. The military courts. 3. The courts of admiralty. 4. The courts of the two universities. In all, their reception in general, and the different degrees of that reception, are grounded entirely upon custom, corroborated in the latter instance by act of *parliament, ratifying [*84 those charters which confirm the customary law of the universities. The more minute consideration of these will fall properly under that part of these commentaries which treats of the jurisdiction of courts. It will suffice at present to remark a few particulars relative to them all, which may serve to inculcate more strongly the doctrine laid down concerning them.

1. And, first, the courts of common law have the superintendency over these courts; to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess, and, in case of contumacy, to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal.

2. The common law has reserved to itself the exposition of all such acts of parliament as concern either the extent of these courts, or the matters depending before them. And therefore, if these courts either refuse to allow these acts of parliament, or

will expound them in any other sense than what the common law puts upon them, the king's courts at Westminster will grant prohibitions to restrain and control them.

3. An appeal lies from all these courts to the king, in the last resort ; which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own. And, from these three strong marks and ensigns of superiority, it appears beyond a doubt that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate, and *leges sub graviore lege* ; and that, thus admitted, restrained, altered, new-modelled, and amended, they are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called the king's ecclesiastical, the king's military, the king's maritime, or the king's academical laws.

*85] *Let us next proceed to the *leges scriptæ*, the written laws of the kingdom which are statutes, acts, or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in parliament assembled. The oldest of these now extant, and printed in our statute books, is the famous *magna charta*, as confirmed in parliament 9 Hen. III. though doubtless there were many acts before that time, the records of which are now lost, and the determinations of them perhaps at present currently received for the maxims of the old common law.

The manner of making these statutes will be better considered hereafter, when we examine the constitution of parliaments. At present we will only take notice of the different kinds of statutes, and of some general rules with regard to their construction (c).

(c) The method of citing these acts of parliament is various. Many of our ancient statutes are called after the name of the place where the parliament was held that made them ; as the statutes of Merton and Marleberge, or Westminster, Gloucester, and Winchester. Some are distinguished by their initial words, as the statute of *quia emptores*, and that of *circumspecte agatis*. But the most usual method of citing them, especially since the time of Edward the Second, is by naming the year of the king's reign in which the statute was made, together with the chapter, or particular act, according to its numeral order, as 9 Geo. II. c. 4, for all the acts of one session of parliament taken together make properly but one statute ; and therefore, when

First, as to their several kinds. Statutes are either *general* or *special*, *public* or *private*. A general or public act is an *universal rule, that regards the whole community; and of [*86 this the courts of law are bound to take notice judicially and *ex officio*; without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being those which only act on particular persons, and private concerns; such as the Romans entitled *senatus decreta*, in contradistinction to the *senatus consulta*, which regarded the whole community; and of these (which are not promulgated with the same notoriety as the former,) the judges are not bound to take notice, unless they be formally shown and pleaded. Thus, to show the distinction, the statute 13 Eliz. c. 10, to prevent spiritual persons from making leases for longer terms than twenty-one years, or three lives, is a public act; it being a rule prescribed to the whole body of spiritual persons in the nation: but an act to enable the bishop of Chester to make a lease to A. B. for sixty years is an exception to this rule; it concerns only the parties and the bishop's successors; and is therefore a private act.

Statutes also are either *declaratory* of the common law, or *remedial* of some defects therein.⁷ Declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Thus the statute of treasons, 25 Edw. III. cap. 2, doth not make any new species of treasons, but only, for the benefit of the subject, declares and enumerates those several kinds of offence which before were treason at the common law. Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time two sessions have been held in one year, we usually mention stat. 1 or 2. Thus the bill of rights is cited as 1 W. and M. st. 2 c. 2, signifying that it is the second chapter or act of the second statute, or the laws made in the second session of parliament, in the first year of King William and Queen Mary.

⁷ This division is generally expressed by declaratory statutes, and statutes introductory of a new law. Remedial statutes are generally mentioned in contradistinction to penal statutes. (CHRISTIAN. See note. 14, p. 55.)

and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever. And this being done, either by enlarging the common law where it was too narrow and circumscribed, *87] or by restraining it *where it was too lax and luxuriant, hath occasioned another subordinate division of remedial acts of parliament into *enlarging* and *restraining* statutes. To instance again in the case of treason: clipping the current coin of the kingdom was an offence not sufficiently guarded against by the common law; therefore it was thought expedient, by statute 5 Eliz. c. 11, to make it high treason, which it was not at the common law: so that this was an *enlarging* statute.⁸ At common law also spiritual corporations might lease out their estates for any term of years, till prevented by the statute 13 Eliz. before mentioned: this was, therefore, a *restraining* statute.

Secondly, the rules to be observed with regard to the construction of statutes are principally these which follow.⁹

1. There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure

⁸ This statute against clipping hardly corresponds with the general notion either of a remedial or an enlarging statute. In ordinary legal language, remedial statutes are contradistinguished to penal statutes. An *enlarging* or *enabling* statute is one which increases, not restrains, the power of action, as the 32 Henry VIII. ch. 28, which gave bishops and all other sole ecclesiastical corporations, except parsons and vicars, a power of making leases, which they did not possess before, is always called an *enabling* statute. The 13 Eliz. ch. 10, which afterwards limited that power, is on the contrary, styled a *restraining* or *disabling* statute. (CHRISTIAN.)

⁹ "A distinction has been drawn between *interpretation* and *construction*. The former word has been taken to mean the sense of the writer as included within his language. The great object of *interpretation* is to ascertain the meaning of a writing, or, in technical phrase, 'of a text.' This is not to be obtained by conjecture, but only by the application of settled rules. *Construction* on the other hand, would embrace the inquiry whether topics that were not expressed in the writing were not included within the general intent of the author, or, as is sometimes said, within the 'spirit' of the text; so, in some instances, the law forbids the exact accomplishment of the author's intent. It then becomes important to know whether the intent shall be carried out, though not precisely, yet as nearly as the law will permit. This is called the *cy pres* doctrine, or the doctrine of approximation." (DWIGHT.)

this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy. Let us instance again in the same restraining statute of 13 Eliz. c. 10: By the common law, ecclesiastical corporations might let as long leases as they thought proper: the mischief was, that they let long and unreasonable leases, to the impoverishment of their successors; the remedy applied by the statute was by making void all leases by ecclesiastical bodies for longer terms than three lives, or twenty-one years. Now, in the construction of this statute, it is held, that leases, though for a longer term, if made by a bishop, are not void during the bishop's continuance in his see; or, if made by a dean and chapter, they are not void during the continuance of the dean; for the act was made for the benefit and protection of the successor. The mischief is therefore sufficiently suppressed by vacating them after the determination of the interest of the *grantors; but the leases, [*88 during their continuance, being not within the mischief, are not within the remedy.¹⁰

2. A statute, which treats of things or persons of an inferior rank, cannot by any *general words* be extended to those of a superior. So a statute, treating of "deans, prebendaries, parsons, vicars, and others having spiritual promotion," is held not to ex-

¹⁰ "It is an established rule, in giving construction to a statute, first to ascertain its intent. This may be determined, not only from the language of a part, but from the language of the whole and every part of the statute; and the real intention, when accurately ascertained, will always prevail over the literal sense. The intention of the law-maker is sometimes to be collected from the cause or necessity of making the statute; and, however the intent may be ascertained, it should be followed with reason and discretion, though such construction may seem contrary to the letter of the statute: for it is the *intent* which often gives meaning to words otherwise obscure and doubtful. A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers; and such construction ought to be put upon it as does not suffer it to be eluded." (*Holmes v. Carley*, 31 N. Y. 289.)

As an old writer quaintly expresses it, "It is not the words of the law, but the internal sense of it that makes the law, and our law (like all others) consists of two parts, viz., of body and soul; the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law." (2 Plowden Rep. 465.)

An excellent illustration of this rule is found in *Pierson v. People*, 79 N. Y. 424; *Oates v. Nat. Bk.*, 100 U. S. 239.

tend to bishops, though they have spiritual promotion, deans being the highest persons named, and bishops being of a still higher order.

3. Penal statutes must be construed strictly.¹¹ Thus the statute 1 Edw. VI. c. 12, having enacted that those who are convicted of stealing *horses* should not have the benefit of clergy, the judges conceived that this should not extend to him that should steal but one *horse*, and therefore procured a new act for that purpose in the following year.¹² And, to come nearer our own times, by the statute 14 Geo. II. c. 6, stealing sheep, *or other cattle*, was made felony, without benefit of clergy. But these general words, "or other cattle," being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep. And therefore, in the next sessions, it was found necessary to make another statute, 15 Geo. II. c. 34, extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name.¹³

¹¹ A penal statute is one which imposes a penalty or forfeiture for violating or transgressing the provisions contained therein.

"To interpret a statute *strictly*, is to adhere precisely to the words or letter of the law, which include, of course, fewer particulars than a freer construction. To interpret it *liberally*, largely or comprehensively, is to carry the meaning of the law-giver into more complete effect than a confined interpretation would allow. It may be termed the rational interpretation." (Kent's Comm. i. 465, n.)

¹² [It has since been decided that where statutes use the plural number, a single instance will be comprehended. The 2 Geo. II., ch. 25, enacts that it shall be felony to steal any bank notes; and it has been determined, that the offence is complete by stealing *one* bank note.] (See *Woodford v. People*, 62 N. Y. 117.)

¹³ See *Decatur Bk. v. St. Louis Bk.*, 21 Wall. 294. Thus a statute subjecting an officer of a corporation to personal liability for debts of the corporation, because of neglect of duty, is penal in its character and must be strictly construed. (*Steam Engine Co. v. Hubbard*, 101 U. S. 188.) And in an action to recover a statutory penalty for usury, or to enforce a forfeiture, the same rule is applied. (*Tiffany v. Nat. Bk.*, 18 Wall. 409.)

So statutes authorizing arrest and imprisonment for debt, although remedial to the extent that they are designed to coerce payment, are also regarded as penal, and are not to be extended by construction so as to embrace cases not clearly within them. Thus where a statute authorizes an arrest in cases of *fraud* in contracting a debt, it applies only to *actual, personal* fraud, and does not include merely *legal or constructive* fraud. (*Hathaway v. Johnson*, 55 N. Y. 93.)

There are also important classes of cases in which strict construction is required, though the statutes are not penal. Thus where lands are taken

4. Statutes against frauds¹⁴ are to be liberally and beneficially expounded. This may seem a contradiction to the last rule; most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but when the statute acts upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally. Upon this footing the statute of 13 Eliz. c. 5, which avoids all gifts of goods, &c. made to defraud creditors *and others*, was *held to extend by the general [*89 words to a gift made to defraud the queen of a forfeiture.

5. One part of a statute must be so construed by another, that the whole may (if possible) stand: *ut res magis valeat, quam pereat*.¹⁵ As if land be vested in the king and his heirs by act under a statute for public purposes, in derogation of common law right, this is the rule, and every requisite of the statute having a semblance of benefit to the owner must be complied with. (*In re Water Commrs.*, 96 N. Y. 351.) So conditions in deeds and wills are strictly construed. (58 Me. 73.)

The same is true of statutes which tend to work a public mischief; or which are intended to deprive creditors of a remedy for the recovery of their debts, and of many other similar cases. (See *Smith v. People*, 47 N. Y. 330; *Salters v. Tobias*, 3 Paige, 338; *Yazoo R. Co. v. Thomas*, 132 U. S. 174.)

¹⁴ These are included within the class of *remedial statutes*, which are statutes giving a remedy for the protection or enforcement of a right, or for the redress of an injury, or enlarging or extending a remedy already existing. And it is a general rule that while *penal* statutes are to be construed *strictly*, *remedial* statutes are to be construed *liberally*, with a view to the beneficial ends proposed. (*Hudler v. Golden*, 36 N. Y. 446; *Weed v. Tucker*, 19 N. Y. 433; *Boyd v. U. S.*, 116 U. S. 616.)

"The same statute may be *penal* in one aspect, and *remedial* in another. And therefore, it has been held that the same words in a statute will bear different interpretations, according to the nature of the suit or prosecution instituted upon them. As by the 9 Anne, ch. 14, the statute against gaming, if any person shall lose *at any time or sitting* £10, and shall pay it to the winner, he may recover it back within three months; and if the loser does not within that time, any other person may sue for it, and treble the value besides. So, where an action was brought to recover back fourteen guineas, which had been won and paid after a continuance at play, *except an interruption during dinner*, the court held the statute was *remedial* so far as it prevented the effects of gaming, without inflicting a penalty; and therefore, in this action, they considered it *one time or sitting*; but they said if an action had been brought for the penalty, they would have construed it strictly in favor of the defendant, and would have held that the money had been lost *at two sittings*. (2 Bl. Rep. 1226.)" (CHRISTIAN.)

¹⁵ So when there is an apparent inconsistency between two statutes, such

of parliament, saving the right of A., and A. has at that time a lease of it for three years : here A. shall hold it for his term of three years, and afterwards it shall go to the king. For this interpretation furnishes matter for every clause of the statute to work and operate upon. But,

6. A saving, totally repugnant to the body of the act, is void. If, therefore, an act of parliament vests land in the king and his heirs, saving the right of all persons whatsoever ; or vests the land of A. in the king, saving the right of A. ; in either of these cases the saving is totally repugnant to the body of the statute, and, if good, would render the statute of no effect or operation ; and therefore the saving is void, and the land vests absolutely in the king.¹⁶

7. Where the common law and a statute differ, the common law gives place to the statute ; and an old statute gives place to a new one.¹⁷ And this upon a general principle of universal law, that "*leges posteriores priores contrarias abrogant :*" consonant to which it was laid down by a law of the twelve tables at Rome, that "*quod populus postremum jussit, id jus ratum esto.*" But this is to be understood, only when the latter statute is couched in negative terms, or where its matter is 'so clearly repugnant, that it necessarily implies a negative. As if a former act says, that a juror upon such a trial shall have twenty pounds a year ; and a new statute afterwards enacts, that he shall have twenty marks : here the latter statute, though it does not express, yet necessarily implies a negative, and virtually repeals the former.

exposition should be made as that if possible both may stand together. (*Chamberlain v. Chamberlain*, 43 N. Y. 424 ; see 127 U. S. 406.)

¹⁶ There is a distinction between the effect of a repugnant saving clause and a repugnant proviso. A saving clause is only an exception of a special thing out of the general things mentioned in the statutes, and if repugnant to the purview, is void. But a proviso is used to qualify or restrain the general provisions of an act, or to exclude any possible ground of interpretation as extending to cases not intended by the legislature to be brought within its purview. And if repugnant to the purview, it is not void, but stands as the last expression of the legislature. (59 N. Y. 59 ; but see *Kent's Comm.* I. 463.)

¹⁷ But the repeal of statutes by implication is not favored by the law ; and when a later and a former statute can stand together, both will stand unless the former is expressly repealed, or the inconsistency and repugnancy of the two statutes are plain and unavoidable. In case of such repugnancy, the later act stands as the last expression of the legislative will. (*People v. Palmer*, 52 N. Y. 83 ; *In re Washington R. Co.*, 115 N. Y. 442 ; *Chew Heong v. U. S.*, 112 U. S. 536.)

For if twenty marks be made qualification sufficient, the former statute which requires twenty pounds is at an end. But, if both acts be merely affirmative, *and the substance such that [*90 both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If by a former law an offence be indictable at the quarter-sessions, and a latter law makes the same offence indictable at the assizes; here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either: unless the new statute subjoins express negative words, as, that the offence shall be indictable at the assizes, *and not elsewhere*.¹⁸ *

8. If a statute, that repeals another, is itself repealed afterwards, the first statute is hereby revived, without any formal words for that purpose.¹⁹ So when the statutes of 26 and 35 Hen. VIII., declaring the king to be the supreme head of the church, were repealed by a statute 1 and 2 Philip and Mary, and this latter statute was afterwards repealed by an act of 1 Eliz. there needed not any express words of revival in Queen Eliza-

¹⁸ It is an important rule that where a statute imposing a penalty is repealed, all actions or proceedings founded upon that statute must forthwith be discontinued, and the penalty cannot be imposed, although the offence or injury was committed while the statute was still in force. Thus, if a murder had been committed, and before the trial of the person charged with the crime, or during the progress of the trial, or even after conviction but before judgment, the murder law was repealed without any provision for existing causes of action or prosecution, no punishment could be inflicted. To avoid the operation of this rule, it is often provided in repealing or modifying statutes, that "nothing herein contained shall affect any action or proceeding now pending." (See *Hartung v. People*, 22 N. Y. 95; *Mongeon v. People*, 55 N. Y. 613; *U. S. v. Tynen*, 11 Wall. 88.)

It is specially provided in the U. S. Statutes that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability, incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action for the enforcement of such penalty, forfeiture, or liability." (U. S. Rev. Statutes, p. 2.)

¹⁹ To avoid the effect of this rule, it is provided by the U. S. Statutes that "Whenever an act is repealed, which repealed a former act, such former act shall not thereby be revived, unless it shall be expressly so provided." (U. S. Rev. Stat. p. 2.) A similar statute has been passed in England, and in a number of the American States. In those States where there is no such statute, it is common to insert a clause of similar purport in the statute repealing the former repeal. (See *U. S. v. Philbrick*, 120 U. S. 12.)

beth's statute, but these acts of King Henry were impliedly and virtually revived.

9. Acts of parliament derogatory from the power of subsequent parliaments bind not.²⁰ So the statute 11 Hen. VII. c. 1, which directs that no person for assisting a king *de facto* shall be attainted of treason by act of parliament or otherwise, is held to be good only as to common prosecutions for high treason; but will not restrain or clog any parliamentary attainder. Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle, Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavor to tie up the hands of succeeding legislatures. "When you repeal *91] the *law itself, (says he,) you at the same time repeal the prohibitory clause, which guards against such repeal."

10. Lastly, acts of parliament that are impossible to be performed are of no validity: and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to these collateral consequences, void. I lay down the rule with those restrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it; ²¹ and the examples usually

²⁰ A provision inserted in a statute that the statute should not be repealed, would not be binding upon subsequent legislatures. Legislation cannot in this way be rendered irrepealable. Nor can one legislature declare in advance the intent of subsequent legislatures, or the effect of subsequent legislation upon existing statutes. (111 N. Y. 140; 55 N. Y. 613.) But in the United States, legislation is, in some classes of cases, irrepealable, because Constitutional provisions prohibit such repeal. Thus, under the U. S. Constitution, no State can pass any law impairing the obligation of contracts; so that a statute in the nature of a contract would not be subject to repeal, and rights and privileges conferred by it could not be divested. (See *Dartmouth College Case*, 4 Wheaton, 518; 115 U. S. 650; see *post*, p. 189, note 3.)

²¹ In like manner, it is generally held in the United States, that a statute can only be declared void so far as it is in conflict with the Constitution of the State or of the United States, but not because it is opposed to principles of natural justice and reason. "It is not for the judiciary or the executive

alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable, there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it. Thus if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. But, if we could conceive it possible for the parliament to enact, that he should try as well his own cause as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.

These are the several grounds of the laws of England: over and above which, equity is also frequently called in to *as- [*92 sist, to moderate and to explain them. What equity is, and how impossible in its very essence to be reduced to stated rules, hath been shown in the preceding section. I shall therefore only add, that besides the liberality of sentiment with which our common law judges interpret acts of parliament, and such rules of the unwritten law as are not of a positive kind, there are also peculiar courts of equity established for the benefit of the subject; to detect latent frauds and concealments, which the process of the courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality

Department to inquire whether the legislature has violated the genius of the government, or the general principles of liberty and the rights of man, or whether acts are wise or expedient or not; but only whether it has transcended the limits prescribed for it by the Constitution." (Per Caruthers, J., quoted 52 Penn. St. 478; see *Wynehamer v. People*, 13 N. Y. 390, 453, 476; *Cooley's Const. Limitations*, 205-211 [5th ed.].) Still a construction of a

of the rules of the positive or common law. This is the business of our courts of equity, which however are only conversant in matters of property. For the freedom of our constitution will not permit, that in criminal cases a power should be lodged in any judge, to construe the law otherwise than according to the letter. This caution, while it admirably protects the public liberty, can never bear hard upon individuals. A man cannot suffer *more* punishment than the law assigns, but he may suffer *less*. The laws cannot be strained by partiality to inflict a penalty beyond what the letter will warrant; but, in cases where the letter induces **any apparent hardship**, the crown has the power to **pardon**.

statute which would lead to absurd or unjust consequences must always be avoided if possible, since such an intention is not to be attributed to the legislature. (*People v. Commrs. of Taxes*, 95 N. Y. 554; *U. S. v. Kirby*, 7 Wall. 482.) So the courts will not declare a statute unconstitutional, unless it be clearly so. (*Munn v. Illinois*, 94 U. S. 113.)

COMMENTARIES ON THE LAWS OF ENGLAND.

BOOK THE FIRST. OF THE RIGHTS OF PERSONS.

CHAPTER I.

[BL. COMM.—BOOK I. CHAP. I.]

Of the Absolute Rights of Individuals.

THE objects of the laws of England are so very numerous and extensive, that, in order to consider them with any tolerable ease and perspicuity, it will be necessary to distribute them methodically, under proper and distinct heads ; avoiding as much as possible divisions too large and comprehensive on the one hand, and too trifling and minute on the other ; both of which are equally productive of confusion.

* Now, as municipal law is a rule of civil conduct, commanding what is right, and prohibiting what is wrong ; or as Cicero, and after him our Bracton, have expressed it, *sanctio justa, jubens honesta et prohibens contraria*, it follows that the primary and principal objects of the law are RIGHTS and WRONGS. In the prosecution, therefore, of these commentaries, I shall follow this very simple and obvious division ; and shall, in the first place, consider the *rights* that are commanded, and secondly the *wrongs* that are forbidden, by the laws of England.

Rights are, however, liable to another subdivision ; being either, first, those which concern and are annexed to the persons of men, and are then called *jura personarum*, or the *rights of persons* ; or they are secondly, such as a man may acquire over external objects, or things unconnected with his person, which are

styled *jura rerum*, or the *rights of things*. Wrongs also are divisible into, first, *private wrongs*, which, being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and secondly, *public wrongs*, which, being a breach of general and public rights, affect the whole community, and are called crimes and misdemeanors.

The objects of the laws of England falling into this fourfold division, the present commentaries will therefore consist of the four following parts:—1. *The rights of persons*, with the means whereby such rights may be either acquired or lost. 2. *The rights of things*, with the means also of acquiring and losing them. 3. *Private wrongs*, or civil injuries; with the means of redressing them by law. 4. *Public wrongs*, or crimes and misdemeanors; with the means of prevention and punishment.

We are now first to consider the *rights of persons*, with the means of acquiring and losing them.

***123]** *Now the rights of persons that are commanded to be observed by the municipal law are of two sorts: first, such as are due *from* every citizen, which are usually called civil *duties*; and, secondly, such as belong *to* him, which is the more popular acceptance of *rights* or *jura*. Both may indeed be comprised in this latter division; for, as all social duties are of a relative nature, at the same time that they are due *from* one man, or set of men, they must also be due *to* another. But I apprehend it will be more clear and easy to consider many of them as duties required from, rather than as rights belonging to, particular persons. Thus, for instance, allegiance is usually, and therefore most easily, considered as the duty of the people, and protection as the duty of the magistrate; and yet they are reciprocally the rights as well as duties of each other. Allegiance is the right of the magistrate, and protection the right of the people.

Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

The rights of persons considered in their natural capacities are also of two sorts, absolute and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons; relative, which are incident to them as

members of society, and standing in various relations to each other. The first, that is, absolute rights, will be the subject of the present chapter.

By the absolute *rights* of individuals, we mean those which are so in their primary and strictest sense ; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. But with regard to the absolute *duties*, which man is bound * to perform considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. For the end and intent of such laws being only to regulate the behavior of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself, (as drunkenness, or the like,) they then become, by the bad example they set, of pernicious effects to society ; and therefore it is then the business of human laws to correct them. Here the circumstance of publication is what alters the nature of the case. *Public* sobriety is a relative duty and therefore enjoined by our laws ; *private* sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know ; and therefore they can never enforce it by any civil sanction. But, with respect to *rights*, the case is different. Human laws define and enforce as well those rights which belong to a man considered as an individual, as those which belong to him considered as related to others.

For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature ; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies, so that to maintain and regulate these, is clearly a subsequent

consideration. And therefore the principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights *125] as are absolute, which in* themselves are few and simple: and then such rights as are relative, which, arising from a variety of connections, will be far more numerous and more complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to, though in reality they are not, than the rights of the former kind. Let us therefore proceed to examine how far all laws ought, and how far the laws of England actually do, take notice of these absolute rights, and provide for their lasting security.

The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of freewill. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. Political therefore, or civil liberty, which is that of a member of society, is no other than natural liberty, so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public. Hence we may collect *126] that the law, which restrains a man from doing* mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practised by a

monarch, a nobility, or a popular assembly, is a degree of tyranny: nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty: whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state of society, which alone can secure our independence. Thus the statute of King Edward IV., which forbad the fine gentlemen of those times (under the degree of a lord) to wear pikes upon their shoes or boots of more than two inches in length, was a law that savored of oppression; because, however ridiculous the fashion then in use might appear, the restraining it by pecuniary penalties could serve no purpose of common utility. But the statute of King Charles II., which prescribes a thing seemingly as indifferent, (a dress for the dead, who are all ordered to be buried in woollen), is a law consistent with public liberty; for it encourages the staple trade, on which in great measure depends the universal good of the nation. So that laws, when prudently framed, are by no means subversive, but rather introductive of liberty; for, as Mr. Locke has well observed, where there is no law there is no freedom. But then, on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.

The idea and practice of this political or civil liberty flourish in their highest vigor in these kingdoms, where it falls* [*127 little short of perfection, and can only be lost or destroyed by the folly or demerits of its owner: the legislature, and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject. Very different from the modern constitutions of other states, on the continent of Europe, and from the genius of the imperial law; which in general are calculated to vest an arbitrary and despotic power, of controlling the actions of the subject, in the prince, or in a few grandees. And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very

soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and so far becomes a free-man; though the master's right to his services may *possibly* still continue.

The absolute rights of every Englishman, (which, taken in a political and extensive sense, are usually called their liberties,) as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change: their establishment, excellent as it is, being still human. At some times we have seen them depressed by overbearing and tyrannical princes; at others so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But the vigor of our free constitution has always delivered the nation from these embarrassments: and, as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.

First, by the great charter of liberties, which was obtained, sword in hand, from King John, and afterwards, with some alterations, confirmed in parliament by King Henry the Third, his son. Which charter contained very few new grants; but, as Sir Edward Coke observes, was for the most part declaratory of the *128] principal grounds of the fundamental *laws of England.¹ Afterwards by the statute called *confirmatio cartarum*, whereby the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches, and read twice a-year

¹ *Magna Charta* contained a large variety of provisions calculated to redress numerous grievances, which at that time bore oppressively upon the people, but the provision which is of chief importance on constitutional grounds is that which guaranteed the protection of life, liberty, and property, against arbitrary interference and spoliation, and secured the observance of due legal methods of procedure in proceedings against the citizen. It is declared that "no freeman shall be taken, or imprisoned, or disseized, outlawed, or exiled, or in any manner injured, nor will we proceed against him, nor send against him, unless by the lawful judgment of his peers or by the law of the land." From this is derived the provision in the U. S. Constitution, that "no person shall be deprived of life, liberty, or property, without due process of law:" similar provisions have been embodied in the Constitutions of the various States.

to the people ; and sentence of excommunication is directed to be as constantly denounced against all those that, by word, deed, or counsel, act contrary thereto, or in any degree infringe it. Next, by a multitude of subsequent corroborating statutes (Sir Edward Coke, I think, reckons thirty-two), from the first Edward to Henry the Fourth. Then, after a long interval, by *the petition of right*; which was a parliamentary declaration of the liberties of the people, assented to by King Charles the First in the beginning of his reign.² Which was closely followed by the still more ample concessions made by that unhappy prince to his parliament before the fatal rupture between them ; and by the many salutary laws, particularly the *habeas corpus* act, passed under Charles the Second. To these succeeded *the bill of rights*, or declaration delivered by the lords and commons to the Prince and Princess of Orange, 13th of February, 1688 ; and afterwards enacted in parliament, when they became king and queen ; which declaration concludes in these remarkable words : “and they do claim, demand and insist upon, all and singular the premises, as their undoubted rights and liberties.” And the act of parliament itself recognizes “all and singular the rights and liberties asserted and claimed in the said declaration to be the true, ancient and indubitable rights of the people of this kingdom.”³ Lastly,

² The *Petition of Right* was in the main a redeclaration and reassertion of rights and privileges already established and guaranteed, and contained also provisions for the redress of grievances which had grown up since the adoption of Magna Charta and the various confirmatory acts. One of the most serious and burdensome of these grievances was the practice of quartering soldiers upon the citizens in time of peace. The petition provides, among other things, “that no man be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by act of Parliament; that none be called upon to make answer for refusal to do so ; that freemen be imprisoned or detained only by the law of the land, or by due process of law, and not by the King’s special command, without any charge ; that persons be not compelled to receive soldiers and mariners into their houses against the laws and customs of the realm, etc.” From this is borrowed the provision in the U. S. Constitution that “no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.”

³ Among the most important provisions of the *Bill of Rights* are the following: It asserted the right of the subject to petition the king, maintained the right of freedom of speech in Parliament, and the right of freedom in the election of its members ; it declared that the maintenance of standing armies without the consent of Parliament was illegal, and that the king had no

these liberties were again asserted at the commencement of the present century, in the *act of settlement*, whereby the crown was limited to his present majesty's illustrious house: and some new provisions were added, at the same fortunate era, for better securing our religion, laws, and liberties; which the statute declares to be "the birthright of the people of England," according to the ancient doctrine of the common law.

*129] * Thus much for the *declaration* of our rights and liberties. The rights themselves, thus defined by these several statutes, consist in a number of private immunities; which will appear, from what has been premised, to be indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. These therefore were formerly, either by inheritance or purchase, the rights of all mankind; but, in most other countries of the world being now more or less debased or destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England. And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property: be-
cause, as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation.

1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For

power of suspending or dispensing with laws; it provided that excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. The *Bill of Rights* is of much importance in the study of American Constitutional history and jurisprudence, since a number of its provisions were copied literally into the U. S. Constitution and have also been embodied in many of the State Constitutions.

if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look *upon this [*130 offence in quite so atrocious a light, but merely as a heinous misdemeanor.

An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours.

2. A man's limbs (by which for the present we only understand those members which may be useful to him in fight, and the loss of which alone amounts to mayhem by the common law) are also the gift of the wise Creator, to enable him to protect himself from external injuries in a state of nature. To these therefore he has a natural inherent right; and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty.

Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore, if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act: these, though accompanied with all other the requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance. And the same is also a sufficient excuse for the commission of many misdemeanors, as will appear in the fourth book. The constraint a man is under in these circumstances is called in law *duress*, from the Latin *durities*, which there are two *sorts: [*131 duress of imprisonment, where a man actually loses his liberty, of which we shall presently speak; and duress *per minas*, where the hardship is only threatened and impending, which is that we are now discoursing of. Duress *per minas* is either for fear of loss

of life, or else for fear of mayhem, or loss of limb. And this fear must be upon sufficient reason; "*non*," as Bracton expresses it, "*suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem; talis enim debet esse metus, qui in se contineat vitæ periculum, aut corporis cruciatum.*" A fear of battery, or being beaten, though never so well grounded, is no duress; neither is the fear of having one's house burned, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages: but no suitable atonement can be made for the loss of life, or limb. And the indulgence shown to a man under this, the principal, sort of duress, the fear of losing his life or limbs, agrees also with that maxim of the civil law: *ignoscitur ei qui sanguinem suum qualiter qualiter redemptum voluit.*⁴

⁴ In order to constitute *duress of imprisonment*, there must be either an *illegal* restraint of personal liberty, or illegal force or privation imposed upon a person *lawfully* imprisoned, in order to extort from him some promise or contract. Though the imprisonment be under regular and formal legal process, yet if it be sued out maliciously and without probable cause, it will constitute duress. (*Watkins v. Baird*, 6 Mass. 506.) When a party is arrested without just cause, and from motives which the law does not sanction, any contract into which he may enter with the authors of the wrong, to procure his liberation from restraint, is imputed to illegal duress. The element of voluntary assent is wanting. (*Osborn v. Robbins*, 36 N. Y. 365.) But if the imprisonment be *lawful*, an agreement voluntarily entered into in order to obtain a release cannot be avoided. *Duress per minas* includes not only the instances mentioned in the text—fear of loss of life, and of mayhem, or loss of limb, but also *fear of illegal imprisonment*. (*Foshay v. Ferguson*, 5 Hill, 154.) But a contract is not avoided by a menace of *lawful* imprisonment. (*Dunkham v. Griswold*, 100 N. Y. 224.) Nor is it duress to merely threaten one with a civil action or criminal prosecution to redress what is believed to be a wrong. (*Hilborn v. Buchanan*, 78 Me. 482.) Duress to one's husband, wife, child, or parent is a ground of relief as well as duress to one's self. (82 N. Y. 399; 131 Mass. 51; 62 Ia. 42.) It is generally held, as Blackstone states, that threatened injury to property will not avoid a contract, though some American cases are to the contrary. (*Skeate v. Beale*, 11 Ad. & El. 983; *Miller v. Miller*, 68 Pa. St. 486.) It is, however, held that a payment of money obtained by what is called "*duress of goods*" may be recovered back; as where one refuses to deliver up another's goods unless the latter pays a sum of money. (60 N. Y. 498; see 114 Mass. 364; 111 U. S. 22.) It is important for the person so paying to make protest, to show that the payment is not voluntary. (12 N. Y. 99; 132 U. S. 17.) A contract obtained by duress is not void, but voidable, and may be confirmed by the party forced to enter into it. Courts of equity go further than courts of law in avoiding contracts for this cause, and will generally relieve a party from the obligation of a contract made by him when under the influence of extreme terror, or in great necessity, or distress, or apprehension, though not amounting to legal duress. (*Eadie v. Slimmon*, 26 N. Y. 9; see further 7 Wall. 215; 95 U. S. 210; 132 Mass. 164.)

The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with every thing necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor, of which in their proper places. A humane provision ; yet, though dictated by the principles of society, discountenanced by the Roman laws. For the edicts of the Emperor Constantine, commanding the public to maintain the children of those who were unable to provide for them, in order to prevent the murder and exposure of infants, an institution founded on the same principle as our foundling hospitals, though comprised in the Theodosian code, were rejected in Justinian's collection.

* These rights, of life and member, can only be deter- [*132 mined by the death of the person ; which was formerly accounted to be either a civil or natural death. The civil death commenced, if any man was banished or abjured the realm by the process of the common law, or entered into religion ; that is, went into a monastery, and became there a monk professed : in which cases he was absolutely dead in law, and his next heir should have his estate. For such banished man was entirely cut off from society ; and such a monk, upon his profession, renounced solemnly all secular concerns : and besides, as the popish clergy claimed an exemption from the duties of civil life and the commands of the temporal magistrate, the genius of the English laws would not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and refused to submit to its regulations. A monk was therefore accounted *civiliter mortuus*, and when he entered in to religion might, like other dying men, make his testament and executors ; or, if he made none, the ordinary might grant administration to his next of kin, as if he were actually dead intestate. And such executors and administrators had the same power, and might bring the same actions for debts due *to* the religious, and were liable to the same actions for those due *from* him, as if he were naturally deceased. Nay, so far has this principle been carried, that when one was bound in a bond to an abbot and his successors, and afterwards made his executors, and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof ; here the law gave him in

the capacity of abbot, an action of debt against his own executors to recover the money due. In short, a monk or religious was so effectually dead in law, that a lease made even to a third person, during the life (generally) of one who afterwards became a monk, determined by such his entry into religion: for which reason leases, and other conveyances for life, were usually made to have *133] and to hold for the term of one's *natural* life. But, *even in the times of popery, the law of England took no cognizance of *profession* in any foreign country, because the fact could not be tried in our courts; and therefore, since the reformation, this disability is held to be abolished: as is also the disability of banishment, consequent upon abjuration, by statute 21 Jac. I. c. 28.⁵

This natural life being, as was before observed, the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority, yet nevertheless it may, by the divine permission, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments; of the nature, restrictions, expedience, and legality of which, we may hereafter more conveniently inquire in the concluding book of these commentaries. At present, I shall only observe, that whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical; and that, whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the subject is aware of the danger he is exposed to, and may, by prudent caution, provide against it. The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the

⁵ One important species of civil death formerly in England was where a man was attainted, upon sentence to death for crime. (See *post*, p. 1036.) In New York it is provided by statute that a person sentenced to imprisonment in State prison for life shall be thereafter deemed civilly dead, and that a sentence less than for life suspends all the civil rights of the person so sentenced during the term of such imprisonment. But this form of civil death does not divest the criminal of his rights of property, nor can an administrator be appointed upon his estate. (*Avery v. Everett*, 110 N. Y. 317; *In re Zeph*, 50 Hun, 523.)

highest necessity ; and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. "*Nullus liber homo*," says the great charter, "*aliquo modo destruatur, nisi per legale iudicium parium suorum aut per legem terræ*." Which words, "*aliquo modo destruatur*," according to Sir Edward Coke, includes a prohibition, not only of *killing* and *maiming*, but also of *torturing*, (to which our laws are strangers), and of every oppression by color of an illegal authority. And it is enacted by the statute 5 Edw. III. c. 9, that no man shall be forejudged of life or limb contrary to the great charter and the *law of the land ; and again, by [*134 statute 28 Edw. III. c. 3, that no man shall be put to death, without being brought to answer by due process of law.

3. Besides those limbs and members that may be necessary to a man, in order to defend himself or annoy his enemy, the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating and wounding ; though such insults amount not to destruction of life or member.

4. The preservation of a man's health from such practices as may prejudice or annoy it ; and

5. The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice ; since, without these, it is impossible to have the perfect enjoyment of any other advantage or right. But these three last articles (being of much less importance than those which have gone before, and those which are yet to come), it will suffice to have barely mentioned among the rights of persons : referring the more minute discussion of their several branches to those parts of our commentaries which treat of the infringement of these rights, under the head of personal wrongs.

II. Next to personal security, the law of England regards, asserts, and preserves, the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article, that it is a right strictly natural ; that the laws of England have never abridged

it without sufficient cause; and, that in this kingdom, it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great charter is, that no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land.⁶ And many subsequent old statutes expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I. it is enacted, that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law. By 16 Car. I. c. 10, if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council, he

⁶ In the Constitutional law both of England and the United States, the phrases "law of the land" and "due process of law" are deemed to have the same signification and are employed interchangeably. Mr. Webster gave the following definition in the Dartmouth College Case (4 Wheaton, 519): "By the law of the land is most clearly intended the general law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty and property, under the protection of general rules which govern society." (See also *Taylor v. Porter*, 4 Hill 140.) "The better definition of *due process of law* is, that it means law in its regular course of administration, through courts of justice." (2 Kent, Comm. 13.) These phrases do not necessarily import trial by jury, since in equity proceedings juries are unusual, and there are also certain summary modes of proceedings for inferior offenses, as vagrancy, &c., or to enforce police regulations, which have been employed and sanctioned from early times. "Though due process of law generally implies and includes, plaintiff, defendant, regular allegations, opportunity to answer, and a trial according to some settled judicial proceedings, yet this is not universally true. There may be, and we have seen that there are, cases under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands and goods of certain public officers without any such trial." (*Murray's Lessee v. Hoboken Land Co.*, 18 How. U. S. 272.) But under the U. S. Constitution and the Constitutions of the various States, which contain similar clauses, the introduction and establishment of new forms of summary procedure, not in existence when such constitutions were adopted, would not be regarded as compatible with this provision. (See *Rockwell v. Nearing*, 35 N. Y. 302; see also *People v. Gilson*, 109 N. Y. 389; *Dent v. West Va.*, 129 U. S. 114; *Wynehamer v. People*, 13 N. Y. 378; for further definitions of this phrase, see *Pennoyer v. Neff*, 95 U. S. 714; *Davidson v. New Orleans*, 96 id. 97; *Kilbourn v. Thompson*, 103 id. 168, 182.)

shall, upon demand of his counsel, have a writ of *habeas corpus*, to bring his body before the court of king's bench or common pleas, who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II. c. 2, commonly called the *habeas corpus* act, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such retainer.⁷ And, lest this act should be evaded by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. and M. st. 2, c. 2, that excessive bail ought not to be required.

Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, (as in France it is daily practised by the crown), there would soon be an end of all other rights and immunities. Some have thought that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, *are [*123 less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient; for it is the parliament only, or legislative power, that, whenever it sees proper, can au-

⁷ The English *Habeas Corpus* Act has been generally reënacted in the United States with various modifications. The United States Constitution provides that "the privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it." (Sect. 9, Art. 1). Such a suspension occurred during the late civil war. (See pp. 686-693, *post*.)

thorize the crown, by suspending the habeas corpus Act for a short and limited time, to imprison suspected persons without giving any reason for so doing ; as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate "*dent operam consules, ne quid respublica detrimenti capiat*," was called the *senatus consultum ultimæ necessitatis*. In like manner this experiment ought only to be tried in cases of extreme emergency ; and in these the nation parts with its liberty for a while, in order to preserve it for ever.

The confinement of the person, in any wise, is an imprisonment ; so that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment. And the law so much discourages unlawful confinement, that if a man is under *duress of imprisonment*, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like, he may allege this duress, and avoid the extorted bond. *137] But if a man be lawfully imprisoned, *and, either to procure his discharge, or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison ; which warrant must be in writing, under the hand and *seal* of the magistrate, and express the causes of the commitment, in order to be examined into, if necessary, upon a *habeas corpus*. If there be no cause expressed, the gaoler is not bound to detain the prisoner : for the law judges, in this respect, saith Sir Edward Coke, like Festus the Roman governor, that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged.

A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases ; and not to be driven from it unless by the sentence of the law. The king, indeed, by his royal prerogative, may issue out his writ *ne exeat regno*, and prohibit any of his subjects from going into foreign parts without licence. This may be necessary for the public service and

safe-guard of the commonwealth.⁸ But no power on earth, except the authority of parliament, can send any subject of England *out* of the land against his will ; no, not even a criminal. For exile and transportation are punishments at present unknown to the common law ; and, wherever the latter is now inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern act of parliament. To this purpose the great charter declares, that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. And by the *habeas corpus* act, 31 Car. II. c. 2 (that second *magna charta*, and stable bulwark of our liberties,) it is enacted, that no subject of this realm, who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas (where *they can- [*138 not have the full benefit and protection of the common law) ; but that all such imprisonments shall be illegal ; that the person, who shall dare to commit another contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a *præmunire*, and be incapable of receiving the king's pardon : and the party suffering shall also have his private action against the person committing, and all his aiders, advisers, and abettors ; and shall recover treble costs ; besides his damages, which no jury shall assess at less than five hundred pounds. 12. 11. 11. 11.

The law is in this respect so benignly and liberally construed for the benefit of the subject, that, though *within* the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man *out of* the realm, even upon the public service ; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception : he cannot

⁸ The writ of *ne exeat*, though used originally in England for political purposes of state, in order to prevent the departure of subjects who might be needed for the defense of the realm, has for a long period been employed as a part of the remedial process of courts of equity in suits between private parties. It is applicable in the case of equitable debts and claims, where one party desires to prevent the other from withdrawing his person or property from the jurisdiction of the court. It is also in use for the same purpose in a number of the American States. It has been abolished in New York, but a similar remedy by "order of arrest" has been substituted in its place. (Code Civ. Pro. §§ 548 and 550. See U. S. Rev. St. § 717.)

even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador. For this might, in reality, be no more than an honorable exile.

III. The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature, as will be more fully explained in the second book of the ensuing commentaries: but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honor and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseized, or divested, of his freehold, or of his *139] liberties, or free *customs, but by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes it is enacted, that no man's lands or goods shall be seized into the king's hands, against the great charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if any thing be done to the contrary, it shall be redressed, and holden for none.

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature

alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.⁹

* Nor is this the only instance in which the law of [*140

⁹ This right of the State or Government to take the property of a private citizen for public uses, upon the payment of an appropriate compensation, is known as the right of *eminent domain*. There is a special provision in the U. S. Constitution that "[private property shall not be taken for public use, without just compensation.]" (Am'ts, Art 5.) This is only binding upon the Federal Government, but there are similar provisions in the Constitutions of the various States, so that the several State governments are placed under the same obligation and restriction. Particular methods are usually prescribed by statute in which this right shall be exercised, appointing the agencies by which the property is to be selected, providing for the ascertainment of the proper measure of compensation to be awarded, etc., and it is an important rule that such statutory regulations must be strictly observed, since these statutes are in derogation of common right. It is not necessary that the legislature should itself directly exercise the power, for such authority is frequently delegated to corporations, as e.g. railroad, canal, and bridge companies, and other similar bodies corporate. Municipal corporations, as cities, are usually invested with this power. This right extends not only to depriving an owner of corporeal property, as land, but also of that which is incorporeal, as easements and franchises, and compensation must be paid in both classes of cases. Sometimes also an easement (as e.g. a right of way) is created in another's land by the exercise of this power, while at others, the land itself is appropriated and the proprietor's right of ownership is entirely divested. The legislature are the sole judges to what extent the public use requires the extinguishment of the owner's title, and their power in this respect is not limited. (*Brooklyn Park Commissioners v. Armstrong*, 45 N.Y. 234.) The use for which the property is taken must be *public* in its nature; this rule, however, does not require that the use and benefit to be derived, shall be universal, but only that they shall contribute in some form to the general welfare and progress of the community, or of the particular district in which the right is exercised. In some rare cases also, Constitutional provisions permit private property to be taken for *private* uses, as in New York, for private roads. The compensation to be awarded is measured by the value of the property taken, and the direct injury which the owner will sustain from the loss. But a land-owner is not entitled to

the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject in England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament. By the statute 25 Edw. I. c. 5 and 6, it is provided, that the king shall not take any aids or tasks, but by the common assent of the realm. And what that common assent is, is more fully explained by 34 Edw. I. st. 4, c. 1, which enacts, that no talliage or aid shall be taken without the assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land: and again by 14 Edw. III. st. 2, c. 1, the prelates, earls, barons, and commons, citizens, burgesses, and merchants, shall not be charged to make any aid, if it be not by the common assent of the great men and commons in parliament. And as this fundamental law had been shamefully evaded under many succeeding princes, by compulsive loans, and benevolences

compensation for the consequential injury which he suffers, when adjacent property, *not his own*, is taken for public uses; as e.g., where a city in laying out, or grading a street, removes soil which is necessary for the support of the property of a private owner, thereby causing damage to him. (*Radcliff's Exors. v. Mayor of Bkln.*, 4 N. Y. 195; *Conklin v. N. Y. &c. R. Co.*, 102 N. Y. 107; *Transportation Co. v. Chicago*, 99 U. S. 635; *In re Niagara Falls Co.*, 108 N. Y. 375; but see 132 U. S. 75.) But compensation must be paid for invading one's easement over land, though he did not own the land itself, as e.g., his right to a public open street. (*Story v. Elevated R. Co.*, 90 N. Y. 122.)

Another important instance, not mentioned by Blackstone in the text, in which a private citizen may be deprived of his property for the public good, is where buildings are destroyed or torn down in order to prevent the spreading of a conflagration, or in order to raise bulwarks for defence against public enemies. This was a right existing at common law, and might be exercised not only by public authority but by any individual, in case of necessity. As Lord Coke expresses it, "For the Commonwealth a man shall suffer damage; as for the saving of a city or town, a house shall be plucked down if the next be on fire. This every man may do, without being liable to an action." (12 Coke, 13.) In such cases, no right to recover compensation existed at common law in favor of the owner, if the property were destroyed on the ground of public necessity, and the emergency seemed reasonably to require it. But sometimes it is provided by statute that public officers shall alone have discretion to judge of the exigency. It is also sometimes declared that damages may be recovered for the property demolished. Such a right of action is entirely statutory. (See *Wynehamer v. People*, 1 N. Y. 401; 2 Denio, 461; 3 Zabriskie (N. J.), 9 and 590; 120 U. S. 227.) So a person's property may be rendered valueless by the exercise of the "police power" of a State, without entitling him to compensation. (123 U. S. 623.)

extorted without a real and voluntary consent, it was made an article in the petition of right 3 Car. I., that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge, without common consent by act of parliament. And, lastly, by the statute 1 W. and M. st. 2, c. 2, it is declared, that levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament, or for longer time, or in other manner, than the same is or shall be granted, is illegal.

In the three preceding articles we have taken a short view of the principal absolute rights which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the* [*141 constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property. These are:

1. The constitution, powers, and privileges of parliament; of which I shall treat at large in the ensuing chapter.

2. The limitation of the king's prerogative, by bounds so certain and notorious, that it is impossible he should either mistake or legally exceed them without the consent of the people. Of this, also, I shall treat in its proper place. The former of these keeps the legislative power in due health and vigor, so as to make it improbable that laws should be enacted destructive of general liberty: the latter is a guard upon the executive power by restraining it from acting either beyond or in contradiction to the laws, that are framed and established by the other.

3. A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *magna charta*, spoken in the person of the king, who in judgment of law (says Sir Edward Coke), is ever present and repeating them in all his courts, are these; *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam*: "and therefore every subject," continues the same learned

author, "for injury done to him *in bonis, in ieris, vel persona*, by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." It were endless to enumerate all the *affirmative* acts of 142*] parliament, *wherein justice is directed to be done according to the law of the land; and what that law is every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament. I shall, however, just mention a few *negative* statutes, whereby abuses, perversions, or delays of justice, especially by the prerogative, are restrained. It is ordained by *magna charta* that no freeman shall be outlawed, that is, put out of the protection and benefit of the laws, but according to the law of the land. By 2 Edw. III. c. 8, and 11 Ric. II. c. 10, it is enacted, that no commands or letters shall be sent under the great seal, or the little seal, the signet, or privy seal, in disturbance of the law; or to disturb or delay common right; and, though such commandments should come, the judges shall not cease to do right; which is also made a part of their oath by statute 18 Edw. III. st. 4. And by 1 W. and M. st. 2, c. 2, it is declared that the pretended power of suspending, or dispensing with laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

Not only the substantial part, or judicial decisions, of the law, but also the formal part, or method of proceeding, cannot be altered but by parliament; for, if once those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself. The king, it is true, may erect new courts of justice; but then they must proceed according to the old established forms of the common law. For which reason it is declared, in the statute 16 Car. I. c. 10, upon the dissolution of the court of starchamber, that neither his majesty, nor his privy counsel, have any jurisdiction, power or authority, by English bill petition, articles, libel, (which were the course of proceeding in the starchamber, borrowed from the civil law,) or by any other arbitrary way whatsoever, to examine, or draw into question, determine, or dispose of the lands or goods of any subjects of this kingdom; but that the same ought to be tried and

determined in the ordinary courts of justice, and by *course of law*.

4. * If there should happen any uncommon injury, or [***143** infringement of the rights before mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances.¹⁰ In Russia we are told that the czar Peter established a law, that no subject might petition the throne till he had first petitioned to different ministers of state. In case he obtained justice from neither, he might then present a third petition to the prince; but upon pain of death, if found to be in the wrong: the consequence of which was, that no one dared to offer such third petition; and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different; and, while they promote the spirit of peace, they are no check upon that of liberty. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult, as happened in the opening of the memorable parliament of 1640: and, to prevent this, it is provided by the statute 13 Car. II. st. 1, c. 5, that no petition to the king, or either house of parliament, for any alteration in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury in the country; and in London by the lord mayor, aldermen and common council: nor shall any petition be presented by more than ten persons at a time. But, under these regulations, it is declared by the statute 1 W. and M. st. 2, c. 2, that the subject hath a right to petition; and that all commitments and prosecutions for such petitioning are illegal.

5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are

¹⁰ "Congress shall make no law abridging the right of the people, peaceably to assemble, and to petition the government for a redress of grievances." (U.S. Constitution, Am'ts, Art. 1.) Similar provisions are contained in the State Constitutions. (See N. Y. Rev. Statutes, i. p. 85; *U. S. v. Cruikshank*, 92 U. S. 542.)

144*] allowed by law.¹¹ Which is also declared by the same statute, I W. and M. st. 2, c. 2, and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen: liberties more generally talked of, than thoroughly understood; and yet highly necessary to be perfectly known and considered by every man of rank and property, lest his ignorance of the points whereon they are founded should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other. And we have seen that these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary that the constitution of parliament be supported in its full vigor; and limits, certainly known, be set to the royal prerogative. And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birthright to enjoy entire; unless where the laws of our country have laid them under necessary restraints; restraints in themselves so gentle and moderate, as will appear, upon farther inquiry, that no man of

¹¹ It is declared in the U. S. Constitution that, "A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." (Am'ts, Art. 2.) Similar provisions are contained in the constitutions of a number of the States. But it is generally held that statutes prohibiting the carrying of *concealed* weapons are not in conflict with these constitutional provisions, since they merely forbid the carrying of arms in a particular manner, which is likely to lead to breaches of the peace and provoke to the commission of crime, rather than contribute to public or personal defence. In some States, however, a contrary doctrine is maintained. (*State v. Shelby*, 90 Mo. 302; see 116 U. S. 252.)

sense or probity would wish to see them slackened. For all of us have it in our choice to do every thing that a good man would desire to do ; and are restrained from nothing but what would be pernicious either to ourselves or our fellow-citizens. So that this review * of our situation may fully justify the observation [*145 of a learned French author, who indeed generally both thought and wrote in the spirit of genuine freedom (*a*), and who hath not scrupled to profess, even in the very bosom of his native country, that the English is the only nation in the world where political and civil liberty is the direct end of its constitution. Recommending, therefore, to the student of our laws a farther and more accurate search into this extensive and important title, I shall close my remarks upon it with the expiring wish of the famous Father Paul to his country, " ESTO PERPETUA."

CHAPTER II.

[BL. COMM.—BOOK I. CHAP. IX.]

Of Subordinate Magistrates.

IN a former chapter of these Commentaries we distinguished magistrates into two kinds : supreme, or those in whom the sovereign power of the state resides ; and subordinate, or those who act in an inferior secondary sphere. We have hitherto considered the former kind only ; namely, the supreme legislative power or parliament, and the supreme executive power, which is the king : * and are now to proceed to inquire into the rights and duties of the principal subordinate magistrates.

And herein we are not to investigate the powers and duties of his majesty's great officers of state, the lord treasurer, lord chamberlain, the principal secretaries, or the like ; because I do not know that they are in that capacity in any considerable degree the objects of our laws, or have any very important share of

(*a*) Montesquieu, Spirit of Laws, xi. 5.

* The chapters upon these topics have been omitted, as relating exclusively to the English system of government, and therefore not practically important to the American student.

magistracy conferred upon them : except that the secretaries of state are allowed the power of commitment, in order to bring offenders to trial. Neither shall I here treat of the office and authority of the lord chancellor, or the other judges of the superior courts of justice, because they will find a more proper place in the third part of these Commentaries. Nor shall I enter into any minute disquisitions, with regard to the rights and *339] dignities of mayors and *aldermen, or other magistrates of particular corporations ; because these are mere private and strictly municipal rights, depending entirely upon the domestic constitution of their respective franchises. But the magistrates and officers, whose rights and duties it will be proper in this chapter to consider, are such as are generally in use, and have a jurisdiction and authority dispersedly throughout the kingdom : which are, principally, sheriffs ; coroners ; justices of the peace ; constables ; surveyors of highways ; and overseers of the poor. In treating of all which I shall inquire into, first, their antiquity and original ; next, the manner in which they are appointed and may be removed ; and, lastly, their rights and duties. And first of sheriffs.

1. The sheriff is an officer of great antiquity in this kingdom. his name being derived from two Saxon words *ſcire ſcepa*, the reeve, bailiff, or officer of the shire.† He is called in Latin *vice-comes*, as being the deputy of the earl or *comes* ; to whom the custody of the shire is said to have been committed at the first division of this kingdom into counties. But the earls in process of time, by reason of their high employments and attendance on the king's person, not being able to transact the business of the county, were delivered of that burden : reserving to themselves the honor, but the labor was laid on the sheriff. So that now the sheriff does all the king's business in the county ; and though he be still called *vice-comes*, yet he is entirely independent of, and not subject to, the earl ; the king by his letters patent, committing *custodiam comitatus* to the sheriff, and him alone.

Sheriffs were formerly chosen by the inhabitants of the several counties. In confirmation of which it was ordained by statute 28 Edw. I. c. 8, that the people should have election of sheriffs in every shire, where the shrievalty is not of inheritance. For anciently in some counties the sheriffs were hereditary ; as I apprehend they were in Scotland till the statute 20 Geo. II. c. 43 : and

† The English statute law in regard to sheriffs was consolidated in 1887. (50 & 51 Vict. c. 55.) A sheriff's term of office is one year.

still continue in the county of Westmoreland to this day¹: *the city of London having also the inheritance of the shrievalty of Middlesex vested in their body by charter. The reason of these popular elections is assigned in the same statute, c. 13, "that the commons might choose such as would not be a burden to them." And herein appears plainly a strong trace of the democratical part of our constitution; in which form of government it is an indispensable requisite, that the people should choose their own magistrates. This election was in all probability not absolutely vested in the commons, but required the royal approbation. For, in the Gothic constitution, the judges of the county courts (which office is executed by our sheriff) were elected by the people, but confirmed by the king; and the form of their election was thus managed: the people or *incolæ territorii*, choose *twelve* electors, and they nominated *three* persons, *ex quibus rex unum confirmabat*. But with us in England these popular elections, growing tumultuous, were put an end to by the statute 9 Edw. II. st. 2. which enacted, that the sheriffs should from thenceforth be assigned by the chancellor, treasurer, and the judges; as being persons in whom the same trust might with confidence be reposed. By statute 14 Edw. III. c. 7, 23 Hen. VI. c. 8, and 21 Hen. VIII. c. 20, the chancellor, treasurer, president of the king's council, *chief* justices, and *chief* baron, are to make this election; and that on the morrow of All Souls in the exchequer. And the king's letters patent, appointing the new sheriffs, used commonly to bear date the 6th day of November. The statute of Cambridge, 12 Ric. II. c. 2, ordains, that the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justices of the one bench and the other, barons of the exchequer,† and all other that shall be called to ordain, name, or make justices of the peace, *sheriffs* and other officers of the king, shall be sworn to act indifferently, and to appoint no man that sueth either privily or openly to be put in office, but such only as they shall judge to be the best and most sufficient. And the custom now is (and has been at least *ever since the time [*341 of Fortescue, who was chief justice and chancellor of Henry the Sixth) that all the judges, together with the great officers and

¹ Sheriffs are now chosen in this county as in other counties.

² The nominations are still made annually for every county in the Royal Courts of Justice by the great officers of the kingdom. A sheriff must have sufficient land in his county to be able to answer for his acts.

privy counsellors, meet in the exchequer on the morrow of All Souls yearly, (which day is now altered to the morrow of St. Martin by the last act for abbreviating Michaelmas term,) and then and there the judges propose three persons, to be reported (if approved of) to the king, who afterwards appoints one of them to be sheriff.²

This custom, of the *twelve* judges proposing *three* persons, seems borrowed from the Gothic constitution before mentioned ; with this difference, that among the Goths the twelve nominors were first elected by the people themselves. And this usage of ours at its first introduction, I am apt to believe, was founded upon some statute, though not now to be found among our printed laws : first, because it is materially different from the direction of all the statutes before mentioned : which it is hard to conceive that the judges would have countenanced by their concurrence, or that Fortescue would have inserted in his book, unless by the authority of some statute : and also, because a statute is expressly referred to in the record, which Sir Edward Coke tells us, he transcribed from the council book of 3 March, 34 Henry VI. and which is in substance as follows. The king had of his own authority appointed a man sheriff of Lincolnshire, which office he refused to take upon him : whereupon the opinions of the judges were taken, what should be done in this behalf. And the two chief justices, Sir John Fortescue and Sir John Prisot, delivered the unanimous opinion of them all ; “ that the king did an error when he made a person sheriff, that was not chosen and presented to him according to the *statute*, that the person refusing was liable to no fine for disobedience, as if he had been one of the *three* persons chosen according to the tenor of the *statute* ; that they would advise the king to have recourse

² Substantially the same method of appointment still prevails in England. The morrow of St. Martin on which the judges meet is the 12th of November. The names of the proposed sheriffs are afterwards presented to the Queen, who signifies her choice for each county. This appointment is termed technically “pricking the sheriffs.” In the American States, sheriffs are also county officers, but they are generally elected by the people. In New York, for example, they are elected in the respective counties once in every three years, and, during the continuance of their term, can hold no other office. The officers of the Federal Government, who exercise similar functions and duties, are called *marshals*. They are appointed by the President, subject to confirmation by the Senate. (U. S. Rev. St. § 776.)

to the *three* persons that were chosen according to the *statute*, or that some other thrifty man be entreated to occupy the office for this year; and that, the next year, to eschew such inconveniences, the order of the *statute* in this behalf made be observed." But notwithstanding this unanimous resolution of *all [*342 the judges of England, thus entered in the council book, and the statute 34 and 35 Hen. VIII. c. 26, § 61, which expressly recognizes this to be the law of the land, some of our writers have affirmed, that the king, by his prerogative, may name whom he pleases to be sheriff, whether chosen by the judges or no. This is grounded on a very particular case in the fifth year of Queen Elizabeth, when, by reason of the plague, there was no Michaelmas term kept at Westminster; so that the judges could not meet there *in crastino animarum* to nominate the sheriffs: whereupon the queen named them herself, without such previous assembly, appointing for the most part one of the two remaining in the last year's list. And this case, thus circumstanced, is the only authority in our books for the making these extraordinary sheriffs. It is true, the reporter adds, that it was held that the queen by her prerogative might make a sheriff without the election of the judges, *non obstante aliquo statuto in contrarium*: but the doctrine of *non obstante's*, which sets the prerogative above the laws, was effectually demolished by the bill of rights at the revolution, and abdicated Westminster-hall when King James abdicated the kingdom. However, it must be acknowledged, that the practice of occasionally naming what are called pocket-sheriffs, by the sole authority of the crown, hath uniformly continued to the reign of his present majesty; in which, I believe, few, if any, compulsory instances have occurred.

Sheriffs, by virtue of several old statutes, are to continue in their office no longer than one year: and yet it hath been said that a sheriff may be appointed *durante bene placito*, or during the king's pleasure; and so is the form of the royal writ. Therefore, till a new sheriff be named, his office cannot be determined, unless by his own death, or the demise of the king; in which last case it was usual for the successor to send a new writ to the old sheriff; but now by statute 1 Ann. st. 1, c. 8, all officers appointed by the *preceding king may hold their offices for six [*343 months after the king's demise, unless sooner displaced by the successor.† We may further observe, that by statute 1 Ric. II.

† Now, after demise of the Crown, the sheriff holds office for the rest of his term. The regulation in statute 1 Ric. II. c. 11, is also found in the statute now in force. (50 & 51 Vict. c. 55.)

c. 11, no man that has served the office of sheriff for one year can be compelled to serve the same again within three years after.

We shall find it is of the utmost importance to have the sheriff appointed according to law, when we consider his power and duty. These are either as judge, as the keeper of the king's peace, as a ministerial officer of the superior courts of justice, or as the king's bailiff.

In his judicial capacity he is to hear and determine all causes of forty shillings' value and under, in his county court, of which more in its proper place; and he has also a judicial power in divers other civil cases. He is likewise to decide the elections of knights of the shire, (subject to the control of the house of commons,) of coroners, and of verderors; to judge of the qualification of voters, and to return such as he shall determine to be duly elected.³

As the keeper of the king's peace, both by common law and special commission, he is the first man in the county, and superior in rank to any nobleman therein, during his office. He may apprehend, and commit to prison, all persons who break the peace, or attempt to break it; and may bind any one in a recognizance to keep the king's peace. He may, and is bound *ex officio* to pursue, and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody. He is also to defend his county against any of the king's enemies when they come into the land: and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse comitatus*, or power of the county: and this summons every person above fifteen years old, and under the degree of peer, is bound to attend *344] upon warning, *under pain of fine and imprisonment.

³ The judicial powers of the sheriff have been, to some extent, changed by recent English statutes. His jurisdiction in the county court in the case of small debts has been taken away, but he may still hold a county court for election purposes, for the execution of writs, etc. He cannot try criminal offenses. Writs of inquiry are, moreover, directed to the sheriff to assess damages in civil cases where judgment has gone by default, and he has in such cases to empanel a jury to decide the cause. A similar practice of directing writs of inquiry to the sheriff exists commonly in the American States, and is the chief judicial function which he now possesses.

But though the sheriff is thus the principal conservator of the peace in his county, yet by the express directions of the great charter, he, together with the constable, coroner, and certain other officers of the king, are forbidden to hold any pleas of the crown, or, in other words, to try any criminal offence. For it would be highly unbecoming, that the executioners of justice should be also the judges; should impose, as well as levy, fines and amercements; should one day condemn a man to death, and personally execute him the next. Neither may he act as an ordinary justice of the peace during the time of his office: for this would be equally inconsistent; he being in many respects the servant of the justicës.

In his ministerial capacity the sheriff is bound to execute all process issuing from the king's courts of justice. In the commencement of civil causes, he is to serve the writ, to arrest, and to take bail; when the cause comes to trial, he must summon and return the jury; when it is determined, he must see the judgment of the court carried into execution. In criminal matters, he also arrests and imprisons, he returns the jury, he has the custody of the delinquent, and he executes the sentence of the court, though it extend to death itself.

As the king's bailiff, it is his business to preserve the rights of the king within his bailiwick; for so his county is frequently called in the writs; a word introduced by the princes of the Norman line; in imitation of the French, whose territory is divided into bailiwicks, as that of England into counties. He must seize to the king's use all lands devolved to the crown by attainder or escheat; must levy all fines and forfeitures; must seize and keep all waifs, wrecks, estrays, and the like, unless they be granted to some subject; and must also collect the king's rents within the bailiwick, if commanded by process from the exchequer.⁴

*To execute these various offices, the sheriff has under him many inferior officers; an under-sheriff, bailiffs, and gaolers; who must neither buy, sell, nor farm their offices, on forfeiture of 500*l*.

The under-sheriff usually performs all the duties of the office; a very few only excepted, where the personal presence of the

⁴ The power of the sheriff to collect the rents of the Crown has been taken away. His duties as peace officer and his other ministerial functions are still substantially the same as are stated by Blackstone. (50 & 51 Vict. c. 55.)

high-sheriff is necessary. But no under-sheriff shall abide in his office above one year ; and if he does, by statute 23 Hen. VI. c. 8, he forfeits 200*l.*, a very large penalty in those early days. And no under-sheriff or sheriff's officer shall practice as an attorney, during the time he continues in such office : for this would be a great inlet to partiality and oppression.⁵ But these salutary regulations are shamefully evaded, by practicing in the names of other attorneys, and putting in sham deputies by way of nominal under-sheriffs : by reason of which, says Dalton, the under-sheriffs and bailiffs do grow so cunning in their several places, that they are able to deceive, and it may well be feared that many of them do deceive, both the king, the high-sheriff, and the county.

Bailiffs, or sheriff's officers, are either bailiffs of hundreds, or special bailiffs.⁶ Bailiffs of hundreds are officers appointed over those respective districts by the sheriffs, to collect fines therein ; to summon juries ; to attend the judges and justices at the assizes, and quarter sessions ; and also to execute writs and process in the several hundreds. But, as these are generally plain men and not thoroughly skilful in this latter part of their office, that of serving writs, and making arrests and executions, it is now usual to join special bailiffs with them ; who are generally mean persons, employed by the sheriffs on account only of their adroitness and dexterity in hunting and seizing their prey.

⁵ These regulations, that an under-sheriff should not practice as attorney and should not remain in office more than a year, have been abolished by statute, and such officers are now generally attorneys, and frequently remain in office for many consecutive years. The under-sheriff is now nominated by the sheriff within one month after his own appointment. Deputy-sheriffs may now be appointed in England by the sheriff, though these were officers formerly unknown to the English law. (50 & 51 Vict. c. 55.) In New York it is provided that no sheriff, under-sheriff, deputy-sheriff, sheriff's clerk, or coroner, shall, during his continuance in office, practise as attorney or counsellor in any court. (Code Civ. Pro. § 62.) There are similar statutory provisions in other American States. The under-sheriff is appointed in New York by the sheriff, and holds office during the latter's pleasure. There are also deputy-sheriffs, who are appointed in the same way, the sheriff having power to appoint as many deputies as he thinks proper. The practice of the various States is quite similar in these matters.

⁶ The term " bailiff " is but seldom used in the United States. The duties of these subordinate officers are performed by the under-sheriff or deputy sheriff. As to English law, see 50 & 51 Vict. c. 55, s. 29.

The sheriff being * answerable for the misdemeanors of [*346 these bailiffs, they are therefore usually bound in an obligation with sureties for the due execution of their office, and thence are called bound-bailiffs; which the common people have corrupted into a much more homely appellation.

Gaolers are also the servants of the sheriff, and he must be responsible for their conduct. Their business is to keep safely all such persons as are committed to them by lawful warrant; and, if they suffer any such to escape, the sheriff shall answer it to the king, if it be a criminal matter, or, in a civil case, to the party injured.⁷ And to this end the sheriff must have lands sufficient within the county to answer the king and his people. The abuses of gaolers and sheriff's officers, toward the unfortunate persons in their custody, are well restrained and guarded against by statute 32 Geo. II. c. 28, and by statute 14 Geo. III. c. 59, provisions are made for better preserving the health of prisoners, and preventing the goal distemper.

The vast expense, which custom has introduced in serving the office of high-sheriff, was grown such a burthen to the subject, that it was enacted, by statute 13 and 14 Car. II. c. 21, that no sheriff (except of London, Westmoreland, and towns which are counties of themselves) should keep any table at the assizes,

⁷“The absolute authority of the sheriff over the jailer was, however, curtailed by various statutes, and now, by the 28 & 29 Vict. ch. 126, this latter officer is appointed by the justices at sessions, instead of by the sheriff, and holds office during their pleasure. The legal custody of all prisoners confined in prison, under the above act, is vested in the jailer, not in the sheriff, except as regards prisoners under sentence of death, over whom, for the purpose of carrying the sentence into effect, the sheriff has the same jurisdiction as he possessed before the statute.” (Broom and Hadley's Comm. I. 414.) The sheriff is still liable for the escape of a prisoner in a civil case, to the party injured, but not for escapes of criminals. (50 & 51 Vict. c. 55.)

In the United States, this subject is generally regulated by statute. In New York, for instance, the sheriff of each county, as a general rule, has the custody of the jails and prisons therein, and may appoint keepers of such jails, for whose acts they are held responsible. It is the general rule in the several States, that the sheriff shall be liable for the escape of a prisoner detained under civil process, and a civil action for damages may be maintained against him by the party at whose suit the arrest and imprisonment was made. For negligently suffering or wilfully aiding the escape of a prisoner under arrest upon a criminal charge, the sheriff is usually made criminally responsible. (*Dunford v. Weaver*, 84 N. Y. 445; *State v. Newcomer*, 109 Ind. 243.)

except for his own family, or give any presents to the judges or their servants, or have more than forty men in livery : yet for the sake of safety and decency, he may not have less than twenty men in England and twelve in Wales ; upon forfeiture, in any of these cases, of 200*l*.⁸

II. The coroner's is also a very ancient office at the common law. He is called coroner, *coronator*, because he hath principally to do with pleas of the crown, or such wherein the king is more immediately concerned. And in this light the lord chief justice of the King's Bench is the principal coroner in the kingdom ; and may, if he pleases, exercise the jurisdiction of a coroner in *347] any part of the realm. But * there are also particular coroners for every county of England, usually four, but sometimes six, and sometimes fewer. This office is of equal antiquity with the sheriff ; and was ordained together with him to keep the peace, when the earls gave up the wardship of the county.

He is still chosen by all the freeholders in the county court, as by the policy of our ancient laws the sheriffs, and conservators of the peace, and all other officers were, who were concerned in matters that affected the liberty of the people ; and as verderors of the forest still are, whose business it is to stand between the prerogative and the subject in the execution of the forest laws. For this purpose there is a writ at common law *de coronatore eligendo* ; in which it is expressly commanded the sheriff "*quod talem eligi faciat, qui melius et sciat, et velit et possit, officio illi intendere.*" And, in order to effect this the more surely, it was enacted by the statute of Westm. 1, that

⁸ The powers and liabilities of sheriffs are, in the main, the same in the United States as in England. These are, however, as a general rule, extensively and minutely prescribed by statutory provisions, and reference must be made to the statutes of the various States for precise details. Sheriffs are civilly responsible for the neglect or violation of duty on the part of the under-sheriff or deputy sheriffs, while acting in their official capacity. They are held strictly to the faithful performance of the duties of their office ; and in order to secure the proper discharge of such duties, they are usually required to give bonds upon entering into office. Their functions in the service and execution of process in civil and criminal cases, in particular, are of great importance. As their duties are chiefly *ministerial* (see *post*, p. 102, note), they are liable for any neglect, omission, or misconduct in the performance of such duties to the persons injured thereby, as e.g., for wrongful arrests, wrongful levies upon property, failure to execute process, false returns, etc. (*Sharpe v. Doyle*, 102 U. S. 686 ; *Wentworth v. Sawyer*, 76 Me. 434 ; *Bacon v. Cropsey*, 7 N. Y. 195.)

none but lawful and discreet knights should be chosen: and there was an instance in the 5 Edw. III. of a man being removed from this office, because he was only a merchant. But it seems it is now sufficient if a man hath lands enough to be made a knight, whether he be really knighted or not: for the coroner ought to have an estate sufficient to maintain the dignity of this office, and answer any fines that may be set upon him for his misbehavior; and if he hath not enough to answer, his fine shall be levied on the county, as the punishment for electing an insufficient officer. Now indeed, through the culpable neglect of gentlemen of property, this office has been suffered to fall into disrepute, and get into low and indigent hands: so that, although formerly no coroners would condescend to be paid for serving their country, and they were by the aforesaid statute of Westm. 1, expressly forbidden to take a *reward, under pain of a [*348 great forfeiture to the king; yet for many years past they have only desired to be chosen for the sake of their perquisites: being allowed fees for their attendance by the statute 3 Hen. VII. c. 1, which Sir Edward Coke complains of heavily; though, since his time, those fees have been much enlarged.⁹

The coroner is chosen for life; but may be removed, either by being made sheriff, or chosen verderor, which are offices incompatible with the other; or, by the king's writ *de coronatore exonerando*, for a cause to be therein assigned, as that he is engaged in other business, is incapacitated by years or sickness, hath not a sufficient estate in the county, or lives in an inconvenient part of it. And by the statute 25 Geo. II. c. 29, extortion, neglect, or misbehavior, are also made causes of removal.¹⁰

The office and power of a coroner are also, like those of the sheriff, either judicial or ministerial; but principally judicial. This is in great measure ascertained by statute 4 Edw. I. *de officio coronatoris*; and consists, first, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of

⁹ The English statute law in regard to coroners was consolidated in 1887. (50 & 51 Vict. c. 73.) Coroners are still elected by the freeholders, and must own land in fee sufficient to answer for their acts. They are now paid by salaries, not by fees. But a coroner acting in the place of a sheriff is entitled to the same fees.

¹⁰ The present statute is to the same effect. (50 & 51 Vict. c. 73, s. 8.)

his death. And this must be "*super visum corporis*;" for, if the body be not found, the coroner cannot sit. He must also sit at the very place where the death happened; and his inquiry is made by a jury from four, five, or six, of the neighboring towns, over whom he is to preside.¹¹ If any be found guilty by this inquest, of murder or other homicide, he is to commit them to prison for farther trial, and is also to inquire concerning their lands, goods, and chattels, which are forfeited thereby: but, whether it be homicide or not, he must inquire whether any *349] deodand has accrued to the king,¹² or the *lord of the franchise, by this death; and must certify the whole of this inquisition (under his own seal and the seals of his jurors), together with the evidence thereon, to the court of king's bench, or the next assizes. Another branch of his office is to inquire concerning shipwrecks; and certify whether wreck or not, and who is in possession of the goods. Concerning treasure-trove, he is also to inquire who were the finders, and where it is, and whether any one be suspected of having found and concealed a treasure; "and that may be well perceived (saith the old statute of Edw. I.) where one liveth riotously, haunting taverns, and hath done so of long time:" whereupon he might be attached, and held to bail, upon this suspicion only.

The ministerial office of the coroner is only as the sheriff's substitute. For when just exception can be taken to the sheriff, for suspicion of partiality (as that he is interested in the suit, or of kindred to either plaintiff or defendant), the process must then be awarded to the coroner, instead of the sheriff, for execution of the king's writs.¹³

¹¹ It is no longer the rule in England that the coroner must sit at the very place where the death happened. As it is often unknown where persons lying dead have come by their deaths, the inquest may be held by the coroner within whose jurisdiction the body shall be found; and this inquiry is made by a jury from the county, over whom he is to preside. This jury must consist of not less than twelve and not more than twenty-three, and at least twelve must concur in the verdict. The procedure upon an inquest is fully stated in 50 & 51 Vict. c. 73. Coroners have no jurisdiction now to inquire as to the goods of murderers or as to wrecks.

¹² A deodand, in the former English law, was any personal chattel which immediately caused the death of a reasonable creature. It was forfeited to the Crown to be applied to pious uses. This law no longer exists.

¹³ Coroners are generally elected in the United States at the same time as sheriffs and hold office for the same periods. Their authority and func-

III. The next species of subordinate magistrates, whom I am to consider, are justices of the peace; the principal of whom is the *custos rotulorum*, or keeper of the records of the county. The common law hath ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society. And therefore, before the present constitution of justices was invented, there were peculiar officers appointed by the common law for the maintenance of the public peace. Of these some had, and still have, this power annexed to other offices which they hold; others had it merely by itself, and were thence named *custodes* or *conservatores pacis*. Those that were so, *virtute officii*, still continue; but the latter sort are superseded by the modern justices.

The king's majesty is, by his office and dignity royal, the principal conservator of the peace within all his dominions; *and may give authority to any other to see the peace [*350 kept, and to punish such as break it: hence it is usually called the king's peace. The lord chancellor, or keeper, the lord treasurer, the lord high steward of England, the lord mareschal, the lord high constable of England, (when any such officers are in being,) and all the justices of the court of king's bench (by virtue of their offices) and the master of the rolls (by prescription) are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it: the other judges are only so in their own courts. The coroner is also a conservator of the peace within his own county; as is also the sheriff; and both of them

tions are substantially the same as in England, but are to a large extent defined by statute. In New York, for example, it is provided that there shall be four coroners in each county, who shall hold office for three years. They are required to hold an inquest upon receiving notice that a person has been slain, or has suddenly died, or has been dangerously wounded; and it is their duty to summon for the purpose not less than nine nor more than fifteen persons as jurors to hear such inquest. When six or more of such jurors appear they may be sworn and the inquisition held. The coroner may issue subpoenas for witnesses, and if the jury find that any murder, manslaughter, or wounding has been committed, he may issue process for the arrest of the person accused, and hold him to answer the charge. (Code of Criminal Procedure, §§ 773-781.) Coroners also are required to serve process, when the sheriff is an interested party in a suit. In other States, there are similar provisions. There is no such office as that of a coroner under the Federal Government.

may take a recognizance or security for the peace. Constables, tithing-men, and the like, are also conservators of the peace within their own jurisdictions ; and may apprehend all breakers of the peace and commit them, till they find sureties for their keeping it.

Those that were, without any office, simply and merely conservators of the peace, either claimed that power by prescription ; or were bound to exercise it by the tenure of their lands ; or, lastly, were chosen by the freeholders in full county court before the sheriff ; the writ for their election directing them to be chosen "*de probioribus et potentioribus comitatus sui in custodes pacis.*" But when Queen Isabel, the wife of Edward II., had contrived to depose her husband by a forced resignation of the crown, and had set up his son Edward III. in his place ; this, being a thing then without example in England, it was feared would much alarm the people : especially as the old king was living, though hurried about from castle to castle, till at last he met with an untimely death. To prevent therefore any risings, or other disturbance of the peace, the new king sent writs to all the sheriffs in England, the form of which is pre-
 *351] served by *Thomas Walsingham, giving a plausible account of the manner of his obtaining the crown ; to wit, that it was done *ipsius patris beneplacito* : and withal commanding each sheriff that the peace be kept throughout his bailiwick, on pain and peril of disinherittance, and loss of life and limb. And in a few weeks after the date of these writs, it was ordained in parliament, that, for the better maintaining and keeping of the peace in every county, good men and lawful, which were no maintainers of evil, or barretors in the country, should be *assigned* to keep the peace. And in this manner, and upon this occasion, was the election of the conservators of the peace taken from the people, and given to the king ; this assignment being construed to be by the king's permission. But still they were only called conservators, wardens, or keepers of the peace, till the statute 34 Edw. III. c. 1, gave them the power of trying felonies ; and then they acquired the more honorable appellation of justices.

These justices are appointed by the king's special commission under the great seal, the form of which was settled by all the judges, A. D. 1590.† This appoints them all, jointly and

† The appointment is made by the Lord Chancellor.

severally, to keep the peace, and any two or more of them to inquire of and determine felonies and other misdemeanors : in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence ; the words of the commission running thus, "*quorum aliquem vestrum, A. B. C. D. &c, unum esse volumus ;*" whence the persons so named are usually called justices of the *quorum*. And formerly it was customary to appoint only a select number of justices, eminent for their skill and discretion, to be of the *quorum* ; but now the practice is to advance almost all of them to that dignity, naming them all over again in the *quorum* clause, except perhaps only some one inconsiderable person for the sake of propriety ; and no exception is now allowable, *for not expressing in the form of warrants, &c. [*352 that the justice who issued them is of the *quorum*. When any justice intends to act under this commission, he sues out a writ of *dedimus potestatem*, from the clerk of the crown in chancery, empowering certain persons therein named to administer the usual oaths to him ; which done, he is at liberty to act.

Touching the number and qualifications of these justices, it was ordained by statute 18 Edw. III. c. 2, that *two* or *three*; of the best reputation in each county, shall be assigned to be keepers of the peace. But these being found rather too few for that purpose, it was provided by statute 34 Edw. III. c. 1, that one lord, and three or four of the most worthy men in the county, with some learned in the law, shall be made justices in every county. But afterwards the number of justices, through the ambition of private persons, became so large, that it was thought necessary, by statute 12 Ric. II. c. 10, and 14 Ric. II. c. 11, to restrain them at first to six, and afterwards to eight only. But this rule is now disregarded, and the cause seems to be (as Lambard observed long ago), that the growing number of statute laws, committed from time to time to the charge of justices of the peace, have occasioned also (and very reasonably) their increase to a larger number. And, as to their qualifications, the statutes just cited direct them to be of the best reputation, and most worthy men in the county ; and the statute 13 Ric. II. c. 7, orders them to be of the most sufficient knights, esquires, and gentlemen of the law. Also by statute 2 Hen. V. st. 1, c. 4, and

st. 2, c. 1, they must be resident in their several counties.¹⁴ And because, contrary to these statutes, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was enacted by statute 18 Hen. VI. c. 11, that no justice should be put in commission if he had not lands to the value of 20*l. per annum*. And, the rate of money being greatly altered since that time, it is now enacted * 353] by statute 5 Geo. II. c. 18, that every justice, except *as is therein excepted, shall have 100*l. per annum* clear of all deductions; and, if he acts without such qualification, he shall forfeit 100*l.* This qualification is almost an equivalent to the 20*l. per annum* required in Henry the Sixth's time; and of this the justice must now make oath. Also it is provided by the act 5 Geo. II. that no practising attorney, solicitor, or proctor, shall be capable of acting as a justice of the peace.¹⁵

As the office of these justices is conferred by the king, so it subsists only during his pleasure; and is determinable, 1. By the demise of the crown; that is, in six months after. But if the same justice is put in commission by the successor, he shall not be obliged to sue out a new *dedimus*, or to swear to his qualification afresh: nor, by reason of any new commission, to take the oaths more than once in the same reign. 2. By express writ under the great seal, discharging any particular person from being any longer justice. 3. By superseding the commission by

¹⁴ But now it is provided that justices of two adjoining counties resident in one of them may act in the other, and also that they may act in detached parts of counties, as in cities, towns, &c., having a separate jurisdiction. (11 & 12 Vict., ch. 42 & 43; 26 & 27 Vict., ch. 77.)

¹⁵ The property qualification now required for the office of justice of the peace, is that the justice (who must be of full age) must have been for two years before his appointment, the occupier of a dwelling-house assessed to the inhabited house duty at a value of not less than £100 within the county, riding or division, and must have been, during that time, rated to all rates and taxes assessed upon the premises. (38 & 39 Vict., ch. 54 [1875].)

It is still the rule that no person is capable of being a justice of the peace for any county in England or Wales (not being a county of a city or of a town) in which he practices as solicitor; and where a person practices in any city or town, being a county of itself, he is deemed to practice in the county within which such city or town or any part thereof is situated. (34 & 35 Vict. c. 18.)

The justices generally serve without compensation, but in the cities and larger towns there are certain justices called "stipendiary magistrates," to whom a fixed salary is paid.

writ of *supersedeas*, which suspends the power of all the justices, but does not totally destroy it; seeing it may be revived again by another writ, called a *procedendo*. 4. By a new commission, which virtually, though silently discharges all the former justices that are not included therein; for two commissions cannot subsist at once. 5. By accession of the office of sheriff or coroner. Formerly it was thought, that if a man was named in any commission of the peace, and had afterwards a new dignity conferred upon him, that this determined his office; he no longer answering the description of the commission: but now it is provided that, notwithstanding a new title of dignity, the justice on whom it is conferred shall still continue a justice.

The power, office, and duty, of a justice of the peace, depend on his commission, and on the several statutes which *have [***354** created objects of his jurisdiction. His commission, first, empowers him singly to conserve the peace; and thereby gives him all the power of the ancient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals. It also empowers any two or more to hear and determine all felonies and other offences; which is the ground of their jurisdiction at sessions, of which more will be said in its proper place. And as to the powers given to one, two, or more justices by the several statutes, which from time to time have heaped upon them such an infinite variety of business, that few care to undertake, and fewer understand, the office; they are such and of so great importance to the public, that the country is greatly obliged to any worthy magistrate that, without sinister views of his own, will engage in this troublesome service. And therefore if a well-meaning justice makes any undesigned slip in his practice, great lenity and indulgence are shown to him in the courts of law; and there are many statutes made to protect him in the upright discharge of his office; which, among other privileges, prohibit such justices from being sued for any oversights without notice beforehand; and stop all suits begun, on tender made of sufficient amends. But, on the other hand, any malicious or tyrannical abuse of their office is usually severely punished; and all persons who recover a verdict against a justice, for any wilful or malicious injury, are entitled to double costs.¹⁶

¹⁶ The principal statute which now regulates this subject is the 11 & 12

It is impossible upon our present plan to enter minutely into the particulars of the accumulated authority thus committed to the charge of these magistrates. I must therefore refer myself at present to such subsequent part of these Commentaries as will in their turns comprise almost every object of the justices' jurisdiction; and, in the mean time, recommend to the student the perusal of Mr. Lambard's *Eirenarcha*, and Dr. Burn's *Justice of the Peace*, wherein he will find everything relative to this subject, both in ancient and modern practice, collected with great care and accuracy, and disposed in a most clear and judicious method.¹⁷

Vict., ch. 44, which provides, among other things, that no action shall be brought against a magistrate for anything done within his jurisdiction, unless it be done maliciously and without reasonable and probable cause; also that no action shall be brought against a justice for anything done by him in the course of his official duty, more than six months after the act complained of, or without a month's notice.

¹⁷ The office of Justice of the Peace has been adopted in the United States from the English practice. Such Justices may be either county or town officers, and upon them is conferred various legal functions of a subordinate character, which are nevertheless of no little importance. They are usually elective officers, though in some States they are appointed by the Governor. Their terms of office, as a general rule, continue for a brief period of years only, as *e. g.*, four or five years. The nature of their duties, privileges and liabilities, is, to a large extent, defined by statute in the several States, as well as the mode of election or appointment, the tenure of office, etc.; and the statutes must be carefully consulted for detailed information upon these points. A general outline of the most common and important duties and functions which devolve upon such officers, both in England and America, may, however, be given with advantage, to supplement the meagre statements contained in the text. Their chief functions may be divided into those which are *ministerial*, and those which are *judicial*. Acts or duties are said to be *ministerial*, when they are definitively fixed and ascertained, and there is not involved the exercise of a judicial discretion to determine the course to be pursued; as *e. g.*, where a person is under a fixed, imperative obligation to do a certain act which is specially prescribed. Acts or duties are *judicial*, when they require the exercise of judgment or discretion, as when a judge decides upon the merits of a question presented to him for adjudication. The distinction is of much importance, on account of the difference in the nature of the responsibility incurred in the two classes of cases. Important ministerial functions of Justices of the Peace are such as the following: Issuing warrants for the arrest of persons against whom a criminal accusation has been made, or search warrants authorizing a search to be made upon the premises of a certain person, who is charged with having stolen or embezzled them; arresting without warrant any person committing a felony or breach of the peace in their presence; binding over persons to keep the peace in cases of actual or threatened violence, when a complaint

*I shall next consider some offices of lower rank than [*355 those which have gone before, and of more confined jurisdiction ; but still such as are universally in use through every part of the kingdom.

IV. Fourthly, then, of the constable. The word *constable* is

has been duly presented ; issuing subpoenas for witnesses ; binding over witnesses to testify ; committing or discharging persons accused of crime, upon due examination ; admitting to bail, etc. It is evident that many of these functions are incident to the performance of judicial duties, but their nature is essentially diverse. Justices also have generally authority in the United States to take acknowledgments of deeds, affidavits, etc., and in some of the States they have power to celebrate marriages.

The *judicial* functions of Justices of the Peace are either civil or criminal. Their criminal jurisdiction generally extends to the trial of certain offences of a minor grade, such as vagrancy, idleness, drunkenness, profanity, gaming, and the like, without a jury. This mode of trial is known as a "summary proceeding," and is not regarded as in contravention of Constitutional provisions requiring trial by jury and "due process of law," since it existed prior to the establishment of such Constitutions, which are construed with reference to the pre-existing law. In other classes of offences, where jury trial is requisite, Justices usually have power to make a preliminary examination of alleged offenders, and to discharge or commit them, or admit them to bail. Inferior crimes of this kind may also be tried by Justices in a criminal court with a jury, but jurisdiction over the more heinous offences belongs to higher courts.

In England, there are four courts of Justices of the Peace, having criminal jurisdiction—the petty, special, quarter, and general sessions. In the United States, similar courts are sometimes termed "special" or "general sessions," as in New York, while in other cases they are known merely as "Justices' Courts."

The *civil* jurisdiction, which has been quite generally given to Justices' Courts in the United States, usually extends only to cases involving small amounts of money. In New York, for instance, the majority of cases so triable must not involve a claim for more than \$200. Cases concerning titles to land cannot generally be tried in such courts.

For injuries done by a Justice in the exercise of *judicial* functions, he is not liable in a civil action to the party injured, if he had jurisdiction of the cause of action, and acted within it in good faith ; nor (by the law of some States) though his acts were malicious and corrupt. (*Jones v. Brown*, 54 Ia. 74 ; *Pratt v. Gardner*, 2 Cush. 63 ; *Gas Co. v. Donnelly*, 93 N. Y. 557 ; *Grove v. Van Duyn*, 44 N. J. L. 654 ; but see *Downing v. Herrick*, 47 Me. 462.) But if he acted wholly without jurisdiction, or if having jurisdiction he exceeded it, knowing the facts which constitute the defect of jurisdiction, he will be civilly responsible. (*White v. Morse*, 139 Mass. 162 ; *Lange v. Benedict*, 73 N. Y. 12, 34 ; see *Vaughan v. Congdon*, 56 Vt. 111.) But in the performance of *ministerial* duties, he is always responsible for any neglect or violation of duty whereby injury is caused to others. (See *Evarts v. Kiehl*, 102 N. Y. 296.)

frequently said to be derived from the Saxon, *koninz reapel*, and to signify the support of the king. But, as we borrowed the name as well as the office of constable from the French, I am rather inclined to deduce it, with Sir Henry Spelman and Dr. Cowel, from that language ; wherein it is plainly derived from the Latin *comes stabuli*, an officer well known in the empire ; so called because, like the great constable of France, as well as the lord high constable of England, he was to regulate all matters of chivalry, tilts, tournaments, and feats of arms, which were performed on horseback. This great office of lord high constable hath been disused in England, except only upon great and solemn occasions, as the king's coronation and the like, ever since the attainder of Stafford duke of Buckingham under King Henry VIII. ; as in France it was suppressed about a century after by an edict of Louis XIII. ; but from his office, says Lambard, this lower constableness was first drawn and fetched, and is, as it were, a very finger of that hand. For the statute of Winchester, which first appoints them, directs that, for the better keeping of the peace, two constables in every hundred and franchise shall inspect all matters relating to *arms* and *armor*.

Constables are of two sorts, high constables and petty constables. The former were first ordained by the statute of Winchester, as before mentioned : are appointed at the court leets of the franchise or hundred over which they preside, or, in default of that, by the justices at their quarter sessions ; and are *356] removable by the same authority that *appoints them.¹⁸ The petty constables are inferior officers in every town and parish, subordinate to the high constable of the hundred, first instituted about the reign of Edw. III. These petty constables have two offices united in them ; the one ancient, the other modern. Their ancient office is that of headborough, tithing-man, or bors-holder, of whom we formerly spoke, and who are as ancient as the time of King Alfred : their more modern office is that of constable merely ; which was appointed, as was observed, so lately as the reign of Edward III. in order to assist the high constable. And in general the ancient headboroughs, tithing-

¹⁸ Provision has been made by a recent statute for the abolition of the office of high constable, except in certain special cases. (32 & 33 Vict. ch. 47 [1869].) Petty constables have been to a great extent superseded by a county constabulary, having general police powers as peace officers. But constables are still appointed in boroughs. (45 & 46 Vict. c. 50, s. 190.)

men, and borsholders, were made use of to serve as petty constables; though not so generally, but that in many places they still continue distinct officers from the constable. They are all chosen by the jury at the court leet; or, if no court leet be held, are appointed by two justices of the peace.

The general duty of all constables, both high and petty, as well as of the other officers, is to keep the king's peace in their several districts; and to that purpose they are armed with very large powers, of arresting and imprisoning, of breaking open houses, and the like; of the extent of which powers, considering what manner of men are for the most part put into these offices, it is perhaps very well that they are generally kept in ignorance. One of their principal duties, arising from the statute of Winchester, which appoints them, is to keep watch and ward in their respective jurisdictions. Ward, guard, or *custodia*, is chiefly applied to the daytime, in order to apprehend rioters, and robbers on the highways; the manner of doing which is left to the discretion of the justices of the peace and the constable: the hundred being, however, answerable for all robberies committed therein, by daylight, for having kept negligent guard. Watch is properly applicable to the night only, (being called among our Teutonic ancestors *uacht* or *wacta*,) and it *begins at the [***357** time when ward ends, and ends when that begins: for, by the statute of Winchester, in walled towns the gates shall be closed from sunsetting to sunrising, and watch shall be kept in every borough and town especially in the summer season, to apprehend all rogues, vagabonds, and night-walkers, and make them give an account of themselves. The constable may appoint watchmen at his discretion, regulated by the custom of the place; and these, being his deputies, have for the time being the authority of their principal.¹⁹ But, with regard to the infinite number of other minute duties that are laid upon constables by a diversity of statutes, I must again refer to Mr. Lambard and Dr. Burn; in whose compilations may be also seen what powers and duties belong to the constable or tithing-man indifferently, and what to the constable only: for the constable may do whatever the tith

¹⁹ The duties of constables in regard to keeping watch have been, to some extent, changed by recent legislation; but the matter is not of sufficient importance to require a special statement of the present law. (See Broom & Hadley's Comm. i., 430.)

ing-man may; but it does not hold *e converso*, the tithi.g-man not having an equal power with the constable.²⁰

V. We are next to consider the surveyors of the highways. Every parish is bound of common right to keep the high roads that go through it in good and sufficient repair; unless by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person. From this burthen no man was exempt by our ancient laws, whatever other immunities he might enjoy: this being part of the *trinoda necessitas*, to which every man's estate was subject; viz. *expeditio contra hostem, arcium constructio, et pontium reparatio*. For, though the reparation of bridges only is expressed, yet that of roads also must be understood; as in the Roman law, *ad instructiones reparationesque itinerum et pontium, nullum genus hominum nulliusque dignitatis ac venerationis meritis, cessare oportet*. And indeed now, for the most part, the care of the roads only seems to be left to parishes, that of bridges being in great measure devolved upon the county at large, by statute 22 Hen. VIII. c. 5. If the parish neglected these repairs, they might formerly, as they may still, be indicted *358] for such their neglect: but it was not then *incumbent on any particular officer to call the parish together, and set them upon this work; for which reason, by the statute 2 and 3 Ph. and M. c. 8, surveyors of the highways were ordered to be chosen in every parish.

These surveyors were originally, according to the statute of

²⁰ In the United States, constables are usually town officers, elected by the people, holding office for limited terms. Their duties and liabilities are substantially the same as under the English law, except as to keeping watch, and are, to a considerable extent, prescribed by statute. Their duties are of a *ministerial* character, and they are under the usual liabilities of ministerial officers. (See note 17, *ante*.) Among their most important functions, is the service and execution of legal process. Like other peace officers, moreover, they may arrest without warrant in criminal cases, when they have reasonable cause to believe that a felony has been committed by the person taken in custody, though no felony was in fact committed. Felonies are the graver forms of crime, and are distinguished from misdemeanors, which include the inferior and more trivial offences. A felony in New York is any offence punishable capitally, or by imprisonment in State prison, while other crimes are misdemeanors. Some other States have adopted the same distinction. But at common law, the distinction was different, and will be noticed hereafter. Constables may also arrest without warrant for a breach of the peace committed in their presence.

Philip and Mary, to be appointed by the constable and church wardens of the parish; but now they are constituted by two neighboring justices, out of such inhabitants or others, as are described in statute 13 Geo. III. c. 78, and may have salaries allotted them for their trouble.²¹

Their office and duty consists in putting in execution a variety of laws for the repairs of the public highways; that is of ways leading from one town to another: all which are now reduced into one act by statute 13 Geo. III. c. 78, which enacts, 1. That they may remove all annoyances in the highways, or give notice to the owner to remove them: who is liable to penalties on non-compliance. 2. They are to call together all the inhabitants and occupiers of lands, tenements, and hereditaments within the parish, six days in every year, to labor in fetching materials, or repairing the highways: all persons keeping draughts, (of three horses, &c.) or occupying lands, being obliged to send a team for every draught, and for every 50*l.* a year which they keep or occupy: persons keeping less than a draught, or occupying less than 50*l.* a year, to contribute in a less proportion; and all other persons chargeable, between the ages of eighteen and sixty-five, to work or find a laborer. But they may compound with the surveyors, at certain easy rates established by the act. And every cartway leading to any market-town must be made twenty feet wide at the least, if the fences will permit; and may be increased by two justices, at the expense of the parish, to the breadth of thirty feet. 3. The surveyors may lay out their own money in purchasing materials for repairs in erecting guide-posts, and making drains, and shall be reimbursed by a rate, to be allowed at a special sessions. 4. In case the personal labor of the parish be not sufficient, the surveyors, with the consent of the quarter sessions, may levy a rate on the parish, in aid of the personal duty, not exceeding, in any one year, together with the other highway rates, the sum of 9*d.* in the pound; for the due application of which they are to account upon oath. As for turnpikes, which are now pretty generally introduced in aid of such rates, and the law relating to them, these depend principally on the particular powers granted in the several road acts, and upon some general provisions which

²¹ They are now elected annually by the parishioners; but in default of such election the justices may appoint them.

are extended to all turnpike roads in the kingdom, by statute 13 Geo. III. c. 84, amended by many subsequent acts.²²

VI. I proceed therefore, lastly, to consider the overseers of the poor; their original, appointment, and duty.

The poor of England, till the time of Henry VIII. subsisted entirely upon private benevolence, and the charity of well disposed Christians. For, though it appears, by the Mirror, that by the common law the poor were to be "sustained by parsons, rectors of the church, and the parishioners, so that none of them die for default of sustenance;" and though, by the statutes 12 Ric. II. c. 7, and 19 Hen. VII. c. 12, the poor are directed to abide in the cities or towns wherein they were born, or such wherein they had dwelt for three years, (which seem to be the first rudiments of parish settlements,) yet, till the statute 27 Hen. VIII. c. 55, I find no compulsory method chalked out for this purpose: but the poor seem to have been left to such relief as the humanity of their neighbors would afford them. The monasteries were, in particular, their principal resource; and, among other bad effects which attended the monastic institutions, it was not perhaps one of the least (though frequently esteemed quite otherwise) that they supported and fed a very numerous and very idle poor, whose sustenance depended upon *360] what was daily distributed in alms at the gates *of the religious houses. But, upon the total dissolution of these, the inconvenience of thus encouraging the poor in habits of indolence and beggary was quickly felt throughout the kingdom; and abundance of statutes were made in the reign of King Henry the Eighth and his children, for providing for the poor and impotent; which, the preambles to some of them recite, had of late years greatly increased. These poor were principally of two sorts: sick and impotent, and therefore unable to work; idle and sturdy, and therefore able, but not willing, to exercise any honest employment. To provide in some measure for both of these, in and about the metropolis, Edward the Sixth founded three royal hospitals; Christ's and St. Thomas's, for the relief of

²² In the various American States, there are special statutory provisions in regard to the laying out and repair of highways, the appointment or election of officers for this purpose, the extent and nature of their powers, their liabilities, etc., and the statutes of each State must, therefore, be specially consulted.

the impotent through infancy or sickness ; and Bridewell for the punishment and employment of the vigorous and idle. But these were far from being sufficient for the care of the poor throughout the kingdom at large : and therefore, after many other fruitless experiments, by statute 43 Eliz. c. 2, overseers of the poor were appointed in every parish.

By virtue of the statute last mentioned, these overseers are to be nominated yearly in Easter-week, or within one month after, (though a subsequent nomination will be valid), by two justices dwelling near the parish. They must be substantial householders, and so expressed to be in the appointment of the justices.

Their office and duty, according to the same statute, are principally these : first, to raise competent sums for the necessary relief of the poor, impotent, old, blind, and such other, being poor and not able to work ; and secondly, to provide work for such as are able and cannot otherwise get employment ; but this latter part of their duty, which, according to the wise regulations of that salutary statute, should go hand in hand with the other, is now most shamefully neglected. However, for these joint purposes, they are empowered to *make and levy rates [***361** upon the several inhabitants of the parish, by the same act of parliament ; which has been farther explained and enforced by several subsequent statutes.

The two great objects of this statute seem to have been, 1, To relieve the impotent poor and them only. 2, To find employment for such as are able to work ; and this principally, by providing stocks of raw materials to be worked up at their separate homes, instead of accumulating all the poor in one common workhouse ; a practice which puts the sober and diligent upon a level (in point of their earnings) with those who are dissolute and idle ; depresses the laudable emulation of domestic industry and neatness, and destroys all endearing family connections, the only felicity of the indigent. Whereas, if none were relieved but those who are incapable to get their livings, and that in proportion to their incapacity ; if no children were removed from their parents, but such as are brought up in rags and idleness ; and if every poor man and his family were regularly furnished with employment, and allowed the whole profits of their labor ;—a spirit of busy cheerfulness would soon diffuse itself

through every cottage ; work would become easy and habitual, when absolutely necessary for daily subsistence ; and the peasant would go through his task without a murmur, if assured that he and his children, when incapable of work through infancy, age, or infirmity, would then, and then only, be entitled to support from his opulent neighbours.

This appears to have been the plan of the statute of Queen Elizabeth ; in which the only defect was confining the management of the poor to small, parochial, districts ; which are frequently incapable of furnishing proper work, or providing an able director. However, the laborious poor were then at liberty to seek employment wherever it was to be had : none being obliged to reside in the places of their settlement, but such as were unable or unwilling to work ; and those places of settlement being *362 only such where they *were *born*, or had made their *abode*, originally for three years, and afterwards (in the case of vagabonds) for one year only.

After the Restoration, a very different plan was adopted, which has rendered the employment of the poor more difficult, by authorizing the subdivisions of parishes ; has greatly increased their number, by confining them all to their respective districts ; has given birth to the intricacy of our poor-laws, by multiplying and rendering more easy the methods of gaining settlements ; and, in consequence, has created an infinity of expensive lawsuits between contending neighborhoods, concerning those settlements and removals. By the statute 13 and 14 Car. II. c. 12, a legal settlement was declared to be gained by *birth* or by *inhabitaney*, *apprenticeship*, or *service*, for forty days : within which period all intruders were made removable from any parish by two justices of the peace, unless they settled in a tenement of the annual value of 10*l*. The frauds, naturally consequent upon this provision, which gave a settlement by so short a residence, produced the statute 1 Jac. II. c. 17, which directed *notice* in writing to be delivered to the parish officers, before a settlement could be gained by such residence. Subsequent provisions allowed other circumstances of notoriety to be equivalent to such notice given ; and those circumstances have from time to time been altered, enlarged, or restrained, whenever the experience of new inconveniences, arising daily from new regulations, suggested the necessity of a remedy. And the doctrine of *certificates* was in-

vented by way of counterpoise, to restrain a man and his family from acquiring a new settlement by any length of residence whatever, unless in two particular excepted cases ; which makes parishes very cautious of giving such certificates, and of course confines the poor at home, where frequently no adequate employment can be had.

The law of settlements may be therefore now reduced to the following general heads ; or, a settlement in a parish may be acquired 1, By *birth* : for, wherever a child is first known *to [*363 be, that is always *prima facie* the place of settlement, until some other can be shown. This is also generally the place of settlement of a bastard child ; for a bastard having in the eye of the law no father, cannot be referred to *his* settlement, as other children may.²⁸ But, in legitimate children, though the place of birth be *prima facie* the settlement, yet it is not conclusively so ; for there are, 2, Settlements by *parentage*, being the settlement of one's father or mother : all legitimate children being really settled in the parish where their parents are settled, until they get a new settlement for themselves. A new settlement may be acquired several ways ; as, 3, By *marriage*. For a woman marrying a man that is settled in another parish changes her own settlement : the law not permitting the separation of husband and wife. But if the man has no settlement, hers is suspended during his life, if he remains in England and is able to maintain her ; but in his absence, or after his death, or during perhaps, his inability, she may be removed to her old settlement. The other methods of acquiring settlements in any parish are all reducible to this one, of *forty days' residence* therein ; but this forty days' residence (which is construed to be lodging or lying there) must not be by fraud, or stealth, or in any clandestine manner ; but made notorious by one or other of the following concomitant circumstances. The next method therefore of gaining a settlement is, 4, By forty days' residence, and *notice*. For if a stranger comes into a parish, and delivers notice in writing of his place of abode, and number of his family, to one of the overseers (which must be read in the church and registered,) and resides

²⁸ But it is provided by the act, 39 & 40 Vict. c. 61, that no person shall be deemed to derive a settlement from any other person, except that a wife takes that of her husband and a child under sixteen takes that of its father or widowed mother up to that age, and retains it until it gains another

A bastard child retains the settlement of its mother until it acquires another.

there unmolested for forty days after such notice, he is legally settled thereby. For the law presumes that such a one at the time of notice is not likely to become chargeable, else he would not venture to give it : or that, in such case, the parish would take care to remove him. But there are also other circumstances equivalent to such notice : therefore, 5, *Renting* for a year *a tenement of the yearly value of ten pounds, and residing forty days in the parish, gains a settlement without notice ; upon the principle of having substance enough to gain credit for such a house.²⁴ 6, Being charged to and paying the public *taxes* and levies of the parish ; excepting those for scavengers, highways, and the duties on houses and windows ; and, 7, Executing, when legally appointed, any public parochial *office* for a whole year in the parish, as churchwarden, &c. are both of them equivalent to notice, and gain a settlement, if coupled with a residence of forty days. 8, Being *hired* for a year, when unmarried and childless, and *serving* a year in the same service ; and 9, Being bound an *apprentice*, give the servant and apprentice a settlement, without notice, in that place wherein they serve the last forty days. This is meant to encourage application to trades, and going out to reputable services : 10, Lastly, the having an *estate* of one's own, and residing thereon forty days, however small the value may be, in case it be acquired by act of law, or of a third person, as by descent, gift, devise, &c. is a sufficient settlement, but if a man acquire it by his own act, as by purchase, (in its popular sense, in consideration of money paid,) then unless the consideration advanced, *bona fide*, be 30*l.*, it is no settlement for any longer time than the person shall inhabit thereon. He is in no case removable from his own property ; but he shall not, by any trifling or fraudulent purchase of his own, acquire a permanent and lasting settlement.

All persons, not so settled, may be removed to their own parishes, on complaint of the overseers, by two justices of the peace, if they shall adjudge them likely to become chargeable to the parish into which they have intruded ; unless they are in a way of getting a legal settlement, as by having hired a house of **365]** 10*l.* per annum, or living in an *annual service ; for then

²⁴ The method of obtaining a settlement by forty days' residence, with notice, hiring and service, has been abolished and other methods established by statute. The poor laws stated in the text have been much changed by modern English statutes (See 39 & 40 Vict. c. 61.)

they are not removable. And in all other cases, if the parish to which they belong will grant them a certificate, acknowledging them to be *their* parishioners, they cannot be removed merely because *likely* to become chargeable, but only when they become *actually* chargeable. But such certificated person can gain no settlement by any of the means above mentioned, unless by renting a tenement of 10*l.* *per annum*, or by serving an annual office in the parish, being legally placed therein ; neither can an apprentice or servant to such certificated person gain a settlement by such their service.

These are the general heads of the laws relating to the poor, which, by the resolutions of the courts of justice thereon within a century past, are branched into a great variety. And yet, notwithstanding the pains that have been taken about them, they still remain very imperfect, and inadequate to the purposes they are designed for : a fate that has generally attended most of our statute laws, where they have not the foundation of the common law to build on. When the shires, the hundreds, and the tithings, were kept in the same admirable order in which they were disposed by the great Alfred, there were no persons idle, consequently none but the impotent that needed relief : and the statute of 43 Eliz. seems entirely founded on the same principle. But when the excellent scheme was neglected and departed from, we cannot but observe with concern what miserable shifts and lame expedients have from time to time been adopted, in order to patch up the flaws occasioned by this neglect. There is not a more necessary or more certain maxim in the frame and constitution of society, than that every individual must contribute his share in order to the well-being of the community : and surely they must be very deficient in sound policy, who suffer one half of a parish to continue idle, dissolute, and unemployed ; and at length are amazed to find, that the industry of the other half is not able to maintain the whole.²⁵

²⁵ There are systems of poor laws in various American States, providing for the care and support of the poor and necessitous. Such statutes differ greatly in the scope and nature of their provisions, and must therefore be particularly referred to.

CHAPTER III.

[BL. COMM.—BOOK I. CHAP. X.]

Of The People, whether Aliens, Denizens, or Natives.

HAVING, in the preceding chapters, treated of persons as they stand in the public relations of *magistrates*, I now proceed to consider such persons as fall under the denomination of the *people*. And herein all the inferior and subordinate magistrates treated of in the last chapter are included.

The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England ; that is, within the ligeance, or, as it is generally called, the allegiance of the king ; and aliens, such as are born out of it. Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government ; the name and the form are derived to us from our Gothic ancestors. Under the feudal system, every owner of lands held them in subjection to some superior or lord, from whom or whose ancestors the tenant or vassal, had received them ; and there was a mutual trust or confidence subsisting between the lord and vassal, that the lord should protect the vassal in the enjoyment of the territory he had granted him and, on the *other hand, that *367] the vassal should be faithful to the lord, and defend him against all his enemies. This obligation on the part of the vassal was called *fidelitas*, or fealty ; and an oath of fealty was required, by the feudal law, to be taken by all tenants of their landlord, which is couched in almost the same terms as our ancient oath of allegiance ; except that in the usual oath of fealty there was frequently a saving or exception of the faith due to a superior lord by name, under whom the landlord himself was perhaps only a tenant or vassal. But when the acknowledgment was made to the absolute superior himself, who was vassal to no man, it was no longer called the oath of fealty.

but the oath of allegiance; and therein the tenant swore to bear faith to his sovereign lord, in opposition to all men, without any saving or exception: "*contra omnes homines fidelitatem fecit.*" Land held by this exalted species of fealty was called *feudum ligium*, a liege fee; the vassals *homines ligii*, or liege men; and the sovereign their *dominus ligius*, or liege lord. And when sovereign princes did homage to each other, for lands held under their respective sovereignties, a distinction was always made between *simple* homage, which was only an acknowledgment of tenure and *liege* homage, which included the fealty before-mentioned, and the services consequent upon it. Thus when our Edward III. in 1329, did homage to Philip VI. of France for his ducal dominions on that continent, it was warmly disputed of what species the homage was to be, whether *liege* or *simple* homage. But with us in England, it becoming a settled principle of tenure that *all* lands in the kingdom are holden of the king as their sovereign and lord paramount, no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the king alone. By an easy analogy, the term of allegiance was soon brought to signify all other engagements which are due from subjects to their prince, as well as those duties which were simply and merely territorial. And the oath of allegiance, as administered for upwards of six hundred years, contained a promise "to be [*368 true and faithful to the king and his heirs, and truth and faith to bear of life and limb and terrene honor, and not to know or hear of any ill or damage intended him, without defending him therefrom." Upon which Sir Matthew Hale makes this remark, that it was short and plain, not entangled with long or intricate clauses or declarations, and yet is comprehensive of the whole duty from the subject to his sovereign. But at the revolution, the terms of this oath being thought perhaps to favor too much the notion of non-resistance, the present form was introduced by the convention parliament which is more general and indeterminate than the former; the subject only promising "that he will be faithful and bear true allegiance to the king," without mentioning "his heirs," or specifying in the least wherein that allegiance consists. The oath of supremacy is principally calculated as a renunciation of the pope's pretended authority; and the oath of abjuration, introduced in the reign of King William, very amply supplies the loose and

general texture of the oath of allegiance ; it recognizing the right of his majesty, derived under the act of settlement ; engaging to support him to the utmost of the juror's power ; promising to disclose all traitorous conspiracies against him ; and expressly renouncing any claim of the descendants of the late pretender, in as clear and explicit terms as the English language can furnish. This oath must be taken by all persons in any office, trust, or employment ; and may be tendered by two justices of the peace to any person whom they shall suspect of disaffection. And the oath of allegiance may be tendered to all persons above the age of twelve years, whether natives, denizens, or aliens, either in the court-leet of the manor, or in the sheriff's tourn, which is the court-leet of the county.¹

But, besides these express engagements, the law also holds that there is an implied, original, and virtual allegiance, *369] owing from every subject to his sovereign, antecedently * to any express promise ; and although the subject never swore any faith or allegiance in form. For as the king, by the very descent of the crown, is fully invested with all the rights, and bound to all the duties of sovereignty, before his coronation ; so the subject is bound to his prince by an intrinsic allegiance, before the superinduction of those outward bonds of oath, homage, and fealty ; which were only instituted to remind the subject of this his previous duty, and for the better securing its performance. The formal profession, therefore, or oath of subjection, is nothing more than a declaration in words of what was before implied in law. Which occasions Sir Edward Coke very justly to observe, that "all subjects are equally bounden to their allegiance as if they had taken the oath ; because it is written by the finger of the law in their hearts, and the taking of the corporeal oath is but an outward declaration of the same." The sanction of an oath, it is true, in case of violation of duty,

¹ Modern statutory changes have removed the barriers which these oaths placed in the way of men who dissented from the tenets of the Established Church, and who were thus debarred from accepting office. The oath of allegiance is now in the following form : " I, —, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, her heirs and successors, according to law. So help me God." This form of oath has taken the place of the former oaths of allegiance, of abjuration, and of supremacy. In this country public officers of the United States must take an oath to support the constitution and bear true faith and allegiance. (U. S. Rev. St. § 1757.)

makes the guilt still more accumulated, by superadding perjury to treason : but it does not increase the civil obligation to loyalty ; it only strengthens the *social* tie by uniting it with that of *religion*.

Allegiance, both express and implied, is however distinguished by the law into two sorts or species, the one natural, the other local ; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection ; at a time, too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude ; which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature. An Englishman who removes to France, or to China, owes the same allegiance *to the [*370 king of England there as at home, and twenty years hence as well as now. For it is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former : for this natural allegiance was intrinsic, and primitive, and antecedent to the other ; and cannot be divested without the concurrent act of that prince to whom it was first due. Indeed the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another : but it is his own act that brings him into these straits and difficulties, of owing service to two masters ; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands by which he is connected to his natural prince.

Local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection : and it ceases the instant such stranger transfers himself from this kingdom to another. Natural allegiance is therefore perpetual, and local temporary only ; and that for this reason, evidently founded upon the nature of government, that allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As therefore the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for this

reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien, only during his residence in this realm, the allegiance of an alien is confined, in point of time, to the duration of such his residence, and, in point of locality, to the dominions of the British empire. From which considerations Sir Matthew Hale deduces this consequence, that though there be an usurper of the crown, yet it is treason for any subject, while the usurper *371] is in full possession of the sovereignty, to *practise anything against his crown and dignity : wherefore, although the true prince regain the sovereignty, yet such attempts against the usurper (unless in defence or aid of the rightful king) have been afterwards punished with death ; because of the breach of that temporary allegiance, which was due to him as king *de facto*. And upon this footing, after Edward IV. recovered the crown, which had long been detained from his house by the line of Lancaster, treasons committed against Henry VI. were capitally punished, though Henry had been declared an usurper by parliament.

This oath of allegiance, or rather the allegiance itself, is hold to be applicable not only to the political capacity of the king, or regal office, but to his natural person, and blood-royal ; and for the misapplication of their allegiance, viz., to the regal capacity or crown, exclusive of the person of the king, were the Spencers banished in the reign of Edward II. And from hence arose that principle of personal attachment, and affectionate loyalty, which induced our forefathers (and, if occasion required, would doubtless induce their sons) to hazard all that was dear to them, life, fortune, and family, in defence and support of their liege lord and sovereign.

This allegiance then, both express and implied, is the duty of all the king's subjects, under the distinctions here laid down, of local and temporary, or universal and perpetual. Their rights are also distinguishable by the same criterions of time and locality ; natural-born subjects having a great variety of rights, which they acquire by being born within the king's ligeance, and can never forfeit by any distance of place or time, but only by their own misbehavior : the explanation of which rights is the principal subject of the two first books of these Commentaries. The same is also in some degree the case of aliens ; though their rights are much more circumscribed, being acquired only

by residence here, and lost whenever they remove. I shall however here endeavor to chalk out some of the principal lines, whereby *they are distinguished from natives, descending [*372 to farther particulars when they come in course.

An alien born may purchase lands, or other estates : but not for his own use, for the king is thereupon entitled to them.² If

² By the common law, there are two methods of acquiring real property, viz., by purchase and by descent. The word "purchase" here, however, is not used in its ordinary sense, but with a peculiar technical meaning, by which it denotes every other mode of acquisition than by descent ; it includes, therefore, both *conveyance* and *devise*. As regards both these modes of acquisition by an alien, the common-law rule is the same,—that the alien can hold the property as against all parties but the State ; but that the State may deprive him of it by a proceeding which is technically termed an "inquest of office," or "office found." This is an investigation made by the proper public officer, together with a jury ; and a finding by such jury that the owner is an alien vests the property immediately in the Crown or State. In some of the United States, the proceeding to forfeit an alien's land is an action instituted by the attorney-general of the State. (See *Munro v. Merchant*, 28 N. Y. 9 ; *Wadsworth v. Wadsworth*, 12 N. Y. 376 ; *Gouverneur v. Robertson*, 11 Wheat. 332.) But aliens cannot take real property by *descent*, and do not even obtain a defeasible title thereby, so that no "inquest of office" is necessary. Nor can a citizen inherit land from an alien, nor one citizen from another, if it is necessary to derive title through an alien. Thus a citizen grandson could not inherit from a citizen grandfather, if the intermediate son was an alien. These rules were adopted in the United States from England as a part of their common-law, but have been to a large extent changed in both countries by statute. Thus by a recent English statute it is provided, that "real and personal property of every description, may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject ; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject." (33 Vict., ch. 14, [1870.]) In a number of the American States, also, the disabilities of aliens in regard to the acquisition and transmission of real property have been removed, either in whole or in part, by statutory provisions. These provisions are very diverse, some States having been more liberal in their legislation upon this subject than others, and the statutes must be specially consulted.

Aliens are also placed under certain political disabilities. Thus in the English statute just referred to, it is declared that the provisions in regard to holding property "shall not qualify an alien for any office, or for any municipal, parliamentary, or other franchise." So in the United States they are ineligible to public office and have no right to vote. They may, however, become naturalized and thus remove their disabilities to a greater or less extent. (See *post*, note 4.)

an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England, which would probably be inconsistent with that which he owes to his own natural liege lord : besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences. Wherefore by the civil law such contracts were also made void : but the prince had no such advantage of forfeiture thereby, as with us in England. Among other reasons which might be given for our constitution, it seems to be intended by way of punishment for the alien's presumption, in attempting to acquire any landed property ; for the vendor is not affected by it, he having resigned his right and received an equivalent in exchange. Yet an alien may acquire a property in goods, money, and other personal estate, or may hire a house for his habitation : for personal estate is of a transitory and movable nature ; and, besides, this indulgence to strangers is necessary for the advancement of trade. Aliens also may trade as freely as other people, only they are subject to certain higher duties at the custom-house ; and there are also some other obsolete statutes of Hen. VIII. prohibiting alien artificers to work for themselves in this kingdom ; but it is generally held that they were virtually repealed by statute 5 Eliz. c. 7. Also an alien may bring an action concerning personal property, and may make a will, and dispose of his personal estate : not as it is in France, where the king at the death of an alien is entitled to all he is worth, by the *droit d'aubaine* or *jus albinatus*, unless he has a peculiar exemption. When I mention these rights of an alien, I must be understood of alien friends only, or such whose countries are in peace with ours ; for alien *373] enemies have no *rights, no privileges, unless by the king's special favor, during the time of war.

When I say, that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood with some restrictions. The common law, indeed, stood absolutely so, with only a very few exceptions ; so that a particular act of parliament became necessary after the restoration, " for the naturalization of children of his majesty's English subjects, born in foreign countries during the late troubles." And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such alle-

giances, or serve two masters, at once. Yet the children of the king's ambassadors born abroad were always held to be natural subjects: for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of *postliminium*) to be born under the king of England's allegiance, represented by his father the ambassador. To encourage also foreign commerce, it was enacted by statute 25 Edw. III. st. 2, that all children born abroad, provided *both* their parents were at the time of his birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England; and accordingly it hath been so adjudged in behalf of merchants. But by several more modern statutes these restrictions are still farther taken off: so that all children, born out of the king's ligeance, whose *fathers* (or *grandfathers* by the father's side) were natural-born subjects, are now deemed to be natural-born subjects themselves to all intents and purposes; unless their said ancestors were attainted, or banished beyond sea, for high treason; or were at the birth of such children in the service of a prince at enmity with Great Britain.^a Yet the grandchildren of such ancestors shall not be privileged in respect of the alien's duty, except they be Protestants, and

^aIt has been a much controverted question whether, if a citizen have a child born in a foreign country, such child is not, by the common-law and irrespective of statute, also a citizen of his father's native country by reason of parentage. (See *Ludlam v. Ludlam*, 26 N. Y. 356, and an article in 2d *American Law Register*, 193.) But this vexed question is now settled by statutory provisions. A statute of the United States, similar in the main to those of England, provides that "all children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." This statute was passed in 1855. (See *U. S. Rev. St.*, p. 351.)

By a recent English statute, it is provided that any natural-born subject who, at the time of his birth became, under the law of any foreign State, also a subject of such State, may, if of full age and not under any disability, (such as idiocy, lunacy, or being a married woman) make a declaration of alienage in a manner prescribed, and thus cease to be a British subject. So any person born in a foreign country of a father being a British subject, may under the same circumstances make a declaration of alienage with the same effect. (33 Vict., ch. 14 [1870].)

actually reside within the realm; nor shall be enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue.

The children of aliens, born here in England, are, generally *374] speaking, natural-born subjects, and entitled to all the*privileges of such. In which the constitution of France differs from ours; for there, by their *jus albinatus*, if a child be born of foreign parents, it is an alien.

A denizen is an alien born, but who has obtained *ex donatione regis* letters-patent to make him an English subject: a high and incommunicable branch of the royal prerogative. A denizen is in a kind of middle state, between an alien and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not; but cannot take by inheritance: for his parent, through whom he must claim, being an alien, had no inheritable blood; and therefore could convey none to the son. And, upon a like defect of hereditary blood, the issue of a denizen, born *before* denization, cannot inherit to him; but his issue *after* may. A denizen is not excused from paying the alien's duty, and some other mercantile burthens. And no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands, &c. from the crown.

Naturalization cannot be performed but by act of parliament: for by this an alien is put in exactly the same state as if he had been born in the king's ligeance; except only that he is incapable, as well as a denizen, of being a member of the privy council, or parliament, holding offices, grants, &c.⁴ No bill for naturalization can be received in either house of parliament without such disabling clause in it: nor without a clause disabling the person from obtaining any immunity in trade thereby in any

⁴ A comprehensive statute has recently been passed in England, providing for the naturalization of foreigners, which exhibits the same liberal policy which has characterized the legislation of the United States, and of some other countries in modern times, upon this important subject. It provides that an alien who has resided in the United Kingdom, or has been in the service of the Crown, for not less than five years, and intends when naturalized to continue such residence or service, may apply to a principal Secretary of State for a certificate of naturalization. He must adduce evidence of such residence or service, and of his intention to reside or serve; and the Secretary may then, with or without assigning a reason, give or with-

foreign country, unless he shall have resided in Britain for seven years next after the commencement of the session in which he is naturalized. Neither can any person be naturalized or re-hold a certificate, as he thinks most conducive to the public good. The certificate takes effect upon the alien's taking the oath of allegiance. A naturalized subject is entitled to all political and other rights, powers and privileges, and is subject to all obligations of a natural-born British subject, except when he is in the country of which he was previously a subject if he still remains a subject of that country by its laws. The status of married women and infant children, in regard to nationality, follows that of the husband and father. This statute, however, does not affect the grant of letters of denization by the sovereign. (33 Vict., ch. 14.)

In the United States, the Federal Constitution confers upon Congress authority "to establish an uniform rule of naturalization." The power to legislate upon this subject, therefore appertains exclusively to Congress and cannot be exercised by the States. The law at present (1890) in force is as follows :—

1st. The alien must declare on oath before a U. S. circuit or district court, or a district or supreme court of the Territories, or a court of record of any of the States, or to a clerk of either of these courts, two years prior to his admission, that it is *bona fide* his intention to become a citizen of the United States, and to renounce allegiance to any foreign State, and particularly to that State of which he is then a citizen or subject.

2d. He shall, at the time of his application to be admitted, make oath before the court that he will support the U. S. Constitution, and that he renounces all foreign allegiance.

3d. He must give satisfactory evidence of residence within the U. S. for at least five years, and within the State or Territory where the Court is held, for at least one year ; and that he has behaved during that time as a man of good moral character, attached to the principles of the U. S. Constitution, and well disposed to the good order and happiness of the same ; but the oath of the applicant is not sufficient to prove his residence.

4th. He must renounce any hereditary title or order of nobility he may be entitled to in the foreign country.

The provisions in regard to *minors* are as follows : Any alien who has resided in the U. S. from his 18th to his 21st birthday may, after a residence therein of five years (including the three of minority), be naturalized, without making the preliminary declaration otherwise required ; but he must make the usual declaration required at the time of admission, and must further declare on oath, and prove, that for two years previous it has been his *bona fide* intention to become a citizen, and must comply with the other requisites of the naturalization law.

Minor children, residing within the United States at the time of the naturalization of their parents, thereby become themselves citizens.

Any woman who marries a citizen, and who might herself be lawfully naturalized, is deemed a citizen.

If an alien husband dies after having made the preliminary declaration

stored in blood unless he hath received the sacrament of the Lord's supper within one month before the bringing in of the pill; and unless he also takes the oaths of allegiance and supremacy in the presence of the parliament. But these provisions have been usually dispensed with by special acts of parliament, previous to bills of naturalization of any foreign princes or princesses.

***375]** *These are the principal distinctions between aliens, denizens, and natives:⁶ distinctions, which it hath been frequently endeavored since the commencement of this century to lay almost totally aside, by one general naturalization-act for all foreign protestants. An attempt which was once carried into

of intention (see clause 1st above), his widow and children are considered citizens upon taking the oaths prescribed by law.

These rules apply to free white aliens and to aliens of African nativity or descent; but alien enemies are not admitted to citizenship.

There are also special provisions in regard to the naturalization of seamen, and of aliens enlisting in the U. S. Army. (See for further details, U. S. Rev. Stats., pp. 351, 380.) Chinese cannot become citizens. (Act of Congress, May 6, 1882, § 14.)

Naturalized citizens enjoy, with but slight exceptions, the same rights and privileges as native born citizens. By the recent amendments to the Constitution, both classes of citizens are placed on the same footing. Thus it is declared that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person the equal protection of the laws." (14th Am't.) And further, "that the rights of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State on account of race, color or previous condition of servitude." (15th Am't.) But naturalized citizens are not eligible to the office of President or Vice-President, nor in some States, to the office of Governor.

⁶ It is important to gain a correct understanding of the meaning of the term "citizen," since it is sometimes erroneously supposed that citizenship in the United States involves the right to exercise the elective franchise. A citizen may be defined as one who owes a permanent allegiance to the State. Therefore married women, children, the insane, are citizens, although they have no right to vote; and the same is true of other non-voting members of the community. Citizenship may depend either upon birth within a country, or, as has been seen, upon the fact of parentage, or upon naturalization. It is true that while slavery existed in this country, slaves were not deemed to be citizens; and it was held in the famous Dred Scott case (19 *Howard, U. S.* 39) that an emancipated negro was not a citizen of a State, but this was because slaves were regarded as articles of property, and depended upon

execution by the statute 7 Ann. c. 5 ; but this, after three years' experience of it, was repealed by the statute 10 Ann. c. 5, except one clause, which was just now mentioned, for naturalizing the children of English parents born abroad. However, every foreign seaman, who in time of war serves two years on board an English ship, by virtue of the king's proclamation, is *ipso facto* naturalized under the like restrictions as in statute 12 W. III. c. 2 ; and all foreign protestants, and Jews, upon their residing seven years in any of the American colonies, without being absent above two months at a time, and all foreign protestants serving two years in a military capacity there, or being three years employed in the whale fishery, without afterward absenting themselves from the king's dominions for more than one year, and none of them falling within the incapacities declared by statute 4 Geo. II. c. 21, shall be (upon taking the oaths of allegiance and abjuration, or in some cases, an affirmation to the same effect) naturalized to all intents and purposes, as if they had been born in this kingdom ; except as to sitting in parliament or in the privy council, and holding offices or grants of lands, &c. from the crown within the kingdoms of Great Britain or Ireland.⁶ They therefore are admissible to all other privileges, which protestants or Jews born in this kingdom are entitled to. What those privileges are, with respect to Jews in particular, was the subject of very high debates about the time of the famous Jew-bill ; which enables all Jews to prefer bills of naturalization in parliament, without receiving the sacrament, as ordained by statute 7 Jac. I., c. 2. It is not my intention to revive this controversy again ; for the act lived only a few months, and was then repealed : therefore peace be now to its *manes*.⁷

the peculiar legislation and Constitutional provisions in regard to them. The ordinary meaning of the word "citizen," as given above, is that which it bears at common law. But the recent Constitutional amendments declare specifically what classes of persons shall be considered citizens of the United States, and those of the African race are now included. (See these amendments in the previous note.) But Indians not taxed are still deemed not to be citizens. But by Act of Congress of Feb. 8, 1887, citizenship is conferred on Indians accepting lands allotted in severalty and adopting civilized life.

⁶ The various statutes mentioned in this paragraph in regard to Protestants and Jews are now repealed.

⁷ EXPATRIATION. — It is evident that, in accordance with the principles of the common-law, as affected by statutes of naturalization, etc., a person may be at the same time a citizen of different States. For, by the common-law

CHAPTER IV.

[BL. COMM.—BOOK I.—CH. XIV.]

Of Master and Servant.

HAVING thus commented on the rights and duties of persons, as standing in the *public* relations of magistrates and people, the method I have marked out now leads me to consider the rights and duties in *private* economical relations.

The three great relations in private life are, 1. That of *master and servant*; which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labor will not be sufficient to answer the cares incumbent upon him. 2. That of *husband and wife*; which is founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the man-doctrine of inalienable allegiance, a native-born Englishman would not cease to be a British subject by being naturalized in the United States, although he would thereby become a citizen of the latter country. This condition of the law has led in times past to irritating dissensions and controversies between different nations. In order to avoid such causes of difficulty for the future, numerous treaties have, in recent years, been concluded between the various civilized nations, recognizing and sanctioning the right of *expatriation*, as it is termed,—that is, the right of a citizen or subject to throw off entirely his former allegiance upon assuming the duty of allegiance to another country. Such treaties have been made by the United States with Prussia, Russia, Austria, Mexico, and various other nations. These treaties generally provide that a citizen of either of the countries making the treaty, upon becoming naturalized in the other, and residing therein five years, shall be deemed a citizen of the latter country; but, if he had committed a crime before leaving his own country, he may be punished therefor if he ever returns. So it is provided by the recent English Naturalization Act (33 Vict., ch. 14), that any British subject voluntarily becoming naturalized in a foreign State shall cease to be a British subject, and shall be deemed an alien.

There is a statute of the United States, passed in 1868, declaring that “the right of expatriation is a natural and inherent right of all people;” but it is the generally received opinion among jurists that each nation has the right to determine for itself whether its citizens shall be allowed to divest themselves of the duty of allegiance, and that special treaties are therefore the appropriatr means of accomplishing this object.

ne; in which that natural impulse must be confined and regulated. 3. That of *parent and child*, which is consequential to that of marriage, being its principal end and design; and it is by virtue of this relation that infants are protected, maintained, and educated. But, since the parents, on whom this care is primarily incumbent, may be snatched away by death before they have completed their duty, the law has therefore provided a fourth relation; 4. That of *guardian and ward*, which is a kind of artificial parentage, in order to supply the deficiency, whenever it happens, of the natural. Of all these relations in their order.

*In discussing the relation of *master and servant*, I shall, [*423 first, consider the several sorts of servants, and how this relation is created and destroyed; secondly, the effect of this relation with regard to the parties themselves; and, lastly, its effect with regard to other persons.

1. As to the several sorts of servants: I have formerly observed that pure and proper slavery does not, nay cannot, subsist in England: such I mean, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. And indeed it is repugnant to reason, and the principles of natural law, that such a state should subsist any where. The three origins of the right of slavery, assigned by Justinian are all of them built upon false foundations. As, first, slavery is held to arise "*jure gentium*," from a state of captivity in war; whence slaves are called *mancipia, quasi manu capti*. The conqueror, say the civilians, had a right to the life of his captive; and, having spared that, has a right to deal with him as he pleases. But it is an untrue position, when taken generally, that by the law of nature, or nations, a man may kill his enemy: he has only a right to kill him, in particular cases; in cases of absolute necessity, for self-defence; and it is plain this absolute necessity did not subsist, since the victor did not actually kill him, but made him prisoner. War is itself justifiable only on principles of self-preservation; and therefore it gives no other right over prisoners but merely to disable them from doing harm to us, by confining their persons: much less can it give a right to kill, torture, abuse, plunder, or even to enslave, an enemy, when the war is over. Since therefore the right of *making* slaves by captivity depends on a supposed right of slaughter, that foundation failing, the consequence drawn from it must fail likewise. But, secondly, it is

said that slavery may begin "*jure civili*;" when one man sells himself to another. This, if only meant of contracts to serve or *424] work for another, is very *just; but when applied to strict slavery, in the sense of the laws of old Rome or modern Barbary, is also impossible. Every sale implies a price, a *quid pro quo*, an equivalent given to the seller in lieu of what he transfers to the buyer: but what equivalent can be given for life, and liberty, both of which, in absolute slavery, are held to be in the master's disposal? His property also, the very price he seems to receive, devolves *ipso facto* to his master, the instant he becomes his slave. In this case therefore the buyer gives nothing, and the seller receives nothing: of what validity then can a sale be, which destroys the very principles upon which all sales are founded? Lastly, we are told, that besides these two ways by which slaves "*fiunt*," or are acquired, they may also be hereditary: "*servi nascuntur*;" the children of acquired slaves are *jure naturæ*, by a negative kind of birthright, slaves also. But this, being built on the two former rights, must fall together with them. If neither captivity, nor the sale of one's self, can by the law of nature and reason reduce the parent to slavery, much less can they reduce the offspring.

Upon these principles, the law of England abhors, and will not endure the existence of slavery within this nation; so that when an attempt was made to introduce it, by statute 1 Edw. VI. c. 3, which ordained, that all idle vagabonds should be made slaves, and fed upon bread and water, or small drink, and refuse meat; should wear a ring of iron round their necks, arms, or legs; and should be compelled, by beating, chaining, or otherwise, to perform the work assigned them, were it never so vile; the spirit of the nation could not brook this condition, even in the most abandoned rogues; and therefore this statute was repealed in two years afterwards. And now it is laid down, that a slave or negro, the instant he lands in England, becomes a freeman; that is, the law will protect him in the enjoyment of his person, and his property. Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of John or Thomas, this will remain exactly in the same state as *425] *before; for this is no more than the same state of subjection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term. Hence too it fol

lows, that the infamous and unchristian practice of withholding baptism from negro servants, lest they should thereby gain their liberty, is totally without foundation, as well as without excuse. The law of England acts upon general and extensive principles: it gives liberty, rightly understood, that is, protection to a Jew, a Turk, or a Heathen, as well as to those who profess the true religion of Christ; and it will not dissolve a civil obligation between master and servant, on account of the alteration of faith in either of the parties: but the slave is entitled to the same protection in England before, as after, baptism; and, whatever service the heathen negro owed of right to his American master, by general not by local law, the same, whatever it be, is he bound to render when brought to England and made a Christian.¹

1. The first sort of servants, therefore, acknowledged by the laws of England, are *menial servants*; so called from being *intra mœnia*, or domestics. The contract between them and their masters arises upon the hiring. If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons, as well when there is work to be done, as when there is not: but the contract may be made for any larger or smaller term.² All single men between twelve years old

¹ But it was decided in 1772, in the case of James Sommersett, that a heathen negro, when brought to England, owed no service to an American or any other master. (*Lofft's Rep.* 1; 20 *State Trials*, 1.)

² It has been held in England that under this class of "menial servants" would be included not only mere domestics, but also a gardener, a groom, or a huntsman; but not a governess, nor a farm laborer, nor a clerk. The hiring in these cases is subject by custom to the condition that it may be ended by either party, on giving a month's notice or paying a month's wages; but if the servant is dismissed for misconduct, he is not entitled to a month's wages. But this distinction between menial and other servants does not prevail in this country, and this rule in regard to a month's notice or wages has no application. Servants of various kinds stand upon the same footing. The term of service is to be determined by the agreement between the parties. If the contract is for a term longer than a year, it should be put in writing, or it will be invalid. (*Drummond v. Burrell*, 13 Wend. 307.) But even in the case of an oral contract, if the master receives services rendered, and then refuses to go on and complete the contract, the value of the services may be recovered from him upon an implied contract. (*Galvin v. Prentice*, 45 N. Y. 162.) The servant may be lawfully discharged before the

and sixty, and married ones under thirty years of age, and all single women between twelve and forty, not having any visible livelihood, are compellable by two justices to go out to service in husbandry or certain specific trades, for the promotion of honest industry; and no master can put away his servant, or servant leave his master, after being so retained, either before or at the end of his term, without a quarter's warning; unless upon *426] *reasonable cause, to be allowed by a justice of the peace: but they may part by consent, or make a special bargain.⁸

2 Another species of servants are called *apprentices*, (from *apprendre*, to learn,) and are usually bound for a term of years, by deed indented or indentures, to serve their masters, and be maintained and instructed by them. This is usually done to persons of trade, in order to learn their art and mystery; and sometimes very large sums are given with them, as a premium for such their instruction: but it may be done to husbandmen, nay to gentlemen and others. And children of poor persons may be apprenticed out by the overseers, with consent of two justices, till twenty-one years of age, to such persons as are thought fitting; who are also compellable to take them; and it is held that gentlemen of fortune, and clergymen, are equally liable with others to such compulsion; for which purposes our statutes have made the inden-

expiration of his term for immoral conduct; wilful disobedience of orders, gross incompetence to perform his duty, etc.; a habit of intoxication, for example, has been held a sufficient cause. (*Huntingdon v. Claffin*, 38 N. Y. 182.) In such cases, the servant forfeits the wages for the period he has served; and the effect is the same, if he leaves the service before the end of the term without reasonable cause. But if he is prevented by *sickness* from completing the contract, he may recover for the value of the services rendered. (*Wolfe v. Howes*, 20 N. Y. 197.) If the servant is discharged unjustly and without sufficient cause before the expiration of his term, he may treat the contract as rescinded, and bring an action against the master, to recover for the value of the services actually rendered; or he may sue to recover damages for the breach of the contract, and in this action may recover any amount due for services rendered, and also compensation for the damages sustained by the further breach of the contract in wrongfully dismissing him. (*Richardson v. Eagle Works*, 78 Ind. 422; *Howard v. Daly*, 61 N. Y. 362.) But it is the duty of the servant, when so discharged, to endeavor to secure other employment of the same kind, in order to reduce the damages recoverable against his master. (*Fuchs v. Koerner*, 107 N. Y. 529; *James v. Allen Co.*, 44 O. St. 226; *Harrington v. Gies*, 45 Mich. 374.)

⁸ These rules are no longer in force.

cures obligatory, even though such parish-apprentice be a minor. Apprentices to trades may be discharged on reasonable cause, either at the request of themselves or masters, at the quarter-sessions, or by one justice, with appeal to the sessions, who may, by the equity of the statute, if they think it reasonable, direct restitution of a ratable share of the money given with the apprentice: and parish-apprentices may be discharged in the same manner, by two justices. But if an apprentice, with whom less than ten pounds hath been given, runs away from his master, he is compellable to serve out his time of absence, or make satisfaction for the same, at any time within seven years after the expiration of his original contract.⁴

3. A third species of servants are *laborers*, who are only hired by the day or the week, and do not live *intra mœnia*, as *part of the family; concerning whom the statutes before [*427 cited have made many very good regulations: 1. Directing that all persons who have no visible effects may be compelled to work. 2. Defining how long they must continue at work in summer and in winter. 3. Punishing such as leave or desert

⁴ These rules in regard to apprenticeship have been, to a considerable extent, altered by various English statutes. In a number of the American States, there are special statutes providing for the binding out of minor children as apprentices. A brief summary of the regulations in New York will show the general nature of such provisions. It is there provided that the apprenticeship shall be created by written indenture, executed under seal by the employer of the apprentice, and also by the minor's parent or guardian and by the minor himself. The indenture must provide that the apprentice will not leave his employer during the term of apprenticeship; that the employer will furnish suitable board, lodging, and medical attendance for the apprentice, will carefully teach him his trade, and at the end of the term, will give a certificate, stating the full service of the apprenticeship. The term of apprenticeship may be for from three to five years; (in most States having such laws, it may continue during minority.) If the apprentice leaves the service without cause and refuses to return, or if he wilfully refuses to serve, the indentures may be cancelled, and he may also be punished by the imposition of certain penalties, such as imprisonment in a house of correction, forfeiture of claims for compensation, &c. If the employer refuses to fulfil his agreement, the apprentice or his parent or guardian may sue him for damages for the breach of contract. (Laws of 1871, ch. 934.) There are also special provisions for the binding out of pauper children, orphans, etc. It is a general rule that the contract of apprenticeship is not assignable by the employer, so as to bind the apprentice to serve the assignee. It creates a personal trust between the parties.

their work. 4. Empowering the justices at sessions, or the sheriff of the county, to settle their wages; and, 5. Inflicting penalties on such as either give, or exact, more wages than are so settled.⁵

4. There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as *stewards*, *factors*, and *bailiffs*: whom, however, the law considers as servants *pro tempore*, with regard to such of their acts as affect their master's or employer's property. Which leads me to consider—

II. The manner in which this relation of service affects either the master or servant. And, first, by hiring and service for a year, or apprenticeship under indentures, a person gains a settlement in that parish wherein he last served forty days. In the next place persons serving seven years as apprentices to any trade, have an exclusive right to exercise that trade in any part of England. This law, with regard to the exclusive part of it, has by turns been looked upon as a hard law, or as a beneficial one, according to the prevailing humor of the times; which has occasioned a great variety of resolutions in the court of law concerning it; and attempts have been frequently made for its repeal, though hitherto without success.⁶ At common law every man might use what trade he pleased; but this statute restrains that liberty to such as have served as apprentices: the adversaries to which provision say, that all restrictions, which tend to introduce monopolies, are pernicious to trade: the advocates for it allege, that unskilfulness in trade is equally detrimental to the public as monopolies. This reason indeed only *428] extends to such trades, * in the exercise whereof skill is required. But another of their arguments goes much farther; viz. that apprenticeships are useful to the commonwealth, by employing of youth, and learning them to be early industrious; but that no one would be induced to undergo a seven years' servitude, if others, though equally skilful, were allowed the same advantages without having undergone the same discipline: and in this there seems to be much reason. However, the reso-

⁵ Special statutes of this kind in regard to laborers, are seldom if ever met with in the United States

⁶ The restrictions thus imposed on trade were repealed by statutes 54 Geo. III., ch. 96, 5 & 6 W II. IV., ch. 76.

lutions of the courts have in general rather confined than extended the restriction. No trades are held to be within the statute but such as were in being at the making of it: for trading in a country village, apprenticeships are not requisite: and following the trade seven years without any effectual prosecution, either as a master or a servant, is sufficient without an actual apprenticeship.

A master may by law correct his apprentice for negligence or other misbehavior, so it be done with moderation: though, if the master or master's wife beats any other servant of full age, it is good cause of departure. But if any servant, workman, or laborer, assaults his master or dame, he shall suffer one year's imprisonment, and other open corporal punishment, not extending to life or limb.⁷

By service all servants and laborers, except apprentices, become entitled to wages; according to their agreement, if menial servants; or according to the appointment of the sheriff or sessions, if laborers or servants in husbandry: for the statutes for regulation of wages extend to such servants only; it being impossible for any magistrate to be a judge of the employment of menial servants, or of course to assess their wages.⁸

⁷ This statute is now repealed.

⁸ Under this second division of the subject, treating of the "manner in which the relation of service affects either the master or servant," there are important rules in regard to the liability of the master to the servant, of which Blackstone does not treat. We shall consider, I. *The master's liability for injuries to the servant caused by defective machinery, tools, etc.* II. *His liability for injuries which the servant receives from the acts of fellow-servants.**

I. The master is under a legal obligation to use reasonable, ordinary care to furnish to the servant safe and suitable machinery, implements, appliances, materials, etc., for the performance of his work. He is not deemed to be an insurer of the servant's safety and freedom from harm in such cases, but must use such care and precaution as a man of reasonable prudence and forethought would exhibit. If he is guilty of negligence in not using this required degree of care, and the servant, not knowing of the defect in the materials or appliances furnished, is injured while using them, the master may be sued in a civil action and damages recovered for the injuries sustained. Thus, a railroad company, which continued to use a defective and dangerous locomotive after notice of its dangerous condition, was held liable to the fireman who was employed upon such locomotive, but did not know of its defects, for injuries occasioned by its bursting. (*Keegan*

* The common-law rules stated in this note have been much changed in England by a late statute. (43 & 44 Vict. c. 42)

III. Let us, lastly, see how strangers may be affected by this *429] relation of master and servant: or how a master may * behave towards others on behalf of his servant; and what a servant may do on behalf of his master.

v. *Western R. Co.*, 8 N. Y. 175; see *Stringham v. Hilton*, 111 N. Y. 188; *Johnson v. Tow Boat Co.*, 135 Mass. 209.) So, if the master employs the servant to do work involving peculiar danger or extraordinary risks, and the servant cannot be presumed to understand the nature of these risks, the master must inform him upon this point, or will be chargeable with negligence; as if, *e. g.*, he furnishes the servant with a newly-invented and dangerous blasting-powder, which the servant has never before used. (56 Barb. 151; and see 42 N. J. (Law) 467.) But if the master use proper care in providing materials, the servant is presumed to take upon himself the *ordinary risks* incident to the business and the use of such materials; and if he is injured by reason of any unknown defect, or unforeseen casualty, or because he lacks sufficient skill to use the tools, machinery, etc., furnished, he has no right to recover from the master for his injuries. And if in any case the servant knows of dangerous defects in the articles furnished, and continues in the employment without objection, and sustains injury by reason of such defects, he is guilty of contributory negligence, and the master is not liable. This will be true whether the master is aware or ignorant of such defects. (*Hayden v. Mfg. Co.*, 29 Conn. 548.) If, however, the servant in such a case, is induced to remain by the master's promise to amend the defect, he can recover for an injury caused thereby within such a time as it would be reasonable and prudent to remain in the employment while waiting for such repairs. (*Hough v. Railway Co.*, 100 U. S. 213.) The servant may also recover for injuries caused by the master's personal neglect in other ways. (*Roberts v. Smith*, 2 H. & N. 213.)

II. The master must likewise use reasonable care in procuring competent and skilful fellow-servants. If he does not, and one servant, without negligence on his part, is injured by reason of another's incompetence, the master will be liable. The same is true if an unfit servant is retained after knowledge of his incapacity, unless the servant injured knew of the other's incompetence and remained in the service without objection. (*Laning v. N. Y. Cent. R. Co.*, 49 N. Y. 521). But if the master use proper care in this respect, the servant is deemed to assume the risk of injury from the acts of co-servants in the same common employment, and cannot recover against the master for such injuries. But this doctrine is subject to these qualifications: (a) *The servants must be under the same master.* If a servant of one railroad company be engaged in laboring upon a line of track together with the servants of another company and is injured by the negligence of one of them, he can recover against the employer of the one doing the injury. (*Smith v. N. Y. & Harlem R. Co.*, 19 N. Y. 127; see 112 N. Y. 643; 109 U. S. 478.)

(b) *The servants must be in the same common employment.* The employment is considered "common" when, although the immediate object on which one servant is employed is very dissimilar from that on which the other is employed, yet the risk of injury from the negligence of the one

And, first, the master may *maintain*, that is, abet and assist his servant in any action at law against a stranger : whereas, in general, it is an offence against public justice to encourage suits and animosities by helping to bear the expense of them, and is called in law maintenance. A master also may bring an action against any man for beating or maiming his servant ; but in such case he must assign, as a special reason for so doing, his own damage by the loss of his service, and this loss must be proved upon the trial. A master likewise may justify an assault in defence of his servant, and a servant in defence of his master : the master, because he has an interest in his servant, not to be deprived of his service ; the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master. Also if any person do hire or retain my servant, being in my service, for which the servant departeth from me and goeth to serve the other, I may have an action for damages against both the new master and the servant, or either of them :⁹ but if the new master did not know that he is my servant, no action lies ; unless he afterwards refuses to restore him upon

is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be included in his wages. Thus, a carpenter hired by a railroad company to do work near the railway line is a fellow-servant, for the time being, of employees working upon the track. (*Morgan v. Vale of Neath R. Co.*, L. R. 1 Q. B. 149 ; *McAndrews v. Burns*, 39 N. J. L. 117 ; see 42 Mich. 34.)

(c) *The servants may be of different grades* ; thus a foreman is the fellow-servant of one acting under his directions. (98 N. Y. 211 ; 134 Mass. 351 ; L. R. 2 Q. B. 33.) But a general agent, foreman, or other employee, who is entrusted with the performance of duties obligatory upon the master, as, *e. g.*, to furnish suitable materials, and to secure competent fellow-servants, etc., is not regarded, *so far as the performance of these duties is concerned*, as the fellow-servant of other employees ; and if they sustain injury by his negligence in performing these duties, the master is liable, for these are duties the master cannot delegate. (81 N. Y. 516 ; 116 U. S. 642 ; 146 Mass. 586.) Some courts go farther and hold that an employee placed in general control over others is for this reason also the master's representative, and is not to be deemed a co-servant with the subordinates. (112 U. S. 377 ; 52 Ct. 285.) Therefore the rule first stated herein as to a foreman is not accepted in some States.

⁹ See also *Lumley v. Gye*, 2 E. & B. 216 ; *Caughey v. Smith*, 47 N. Y. 244 ; *Woodward v. Washburn*, 3 Denio, 369. In like manner a master may maintain an action against a third person who seduces his female servant, on the ground of loss of service. (See *post*, pp. 167, 697, 698, and notes.)

information and demand. The reason and foundation upon which all this doctrine is built, seem to be the property that every man has in the service of his domestics ; acquired by the contract of hiring, and purchased by giving them wages.

As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given, or implied : *nam qui facit per* *430 *alium, facit per se.* Therefore, if the *servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it : though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful. If an inn keeper's servants rob his guests, the master is bound to restitution : for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery ; *nam, qui non prohibet, cum prohibere possit, jubet.* So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master : for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command.

In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it ; if I pay it to a clergyman's or a physician's servant, whose usual business it is not to receive money for his master, and he embezzles it, I must pay it over again. If a steward lets a lease of a farm, without the owner's knowledge, the owner must stand to the bargain ; for this is the steward's business. A wife, a friend, a relation, that used to transact business for a man, are *quoad hoc* his servants ; and the principal must answer for their conduct : for the law implies, that they act under a general command ; and without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust ; for here is no implied order to the tradesman to trust my servant ; but if I usually send him upon trust, or sometimes on trust and some

times with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority.¹⁰

* If a servant, lastly, by his negligence does any damage [*431 to a stranger, the master shall answer for his neglect: if a smith's servant† lames a horse while he is shoeing him, an action lies against the master, and not against the servant. But in these cases the damage must be done, while he is actually employed in the master's service; otherwise the servant shall answer for his own misbehavior.¹¹ Upon this principle, by the

¹⁰ It is a general rule of law that a principal is bound by all the *contracts* of his agent, within the scope of the authority which he gives the agent, or appears to the world to give him. Such authority, therefore, is either *express* or *implied*. It is *express* when actually and intentionally conferred upon the agent by some positive act; *implied*, when the authority is presumed from the acts or conduct of the principal, or from the nature of the position which the agent fills, or the acts which he is permitted to do without objection from the principal. Instances of implied authority are such as these: the power of a partner to bind the firm in ordinary business transactions; of auctioneers, brokers, etc., to do what the customs of the business authorize, in acting for their principals; so wives, servants, friends, etc., who have been commonly employed, or permitted to do a certain class of acts as agents, have an implied power to continue doing them. There is a distinction between a *general* and a *special* agent. A general agent is one who is employed to transact all business of a particular kind, or to perform all things incident to a particular line of employment. A special agent is one who is employed to render a particular, special service, to act in a single instance. The authority of a general agent to perform all things usual in the line of business in which he is employed, cannot be limited by any private instructions, not known to the party dealing with him; and the principal, in such a case, will be bound by the agent's acts. But in the case of a special agent, the person dealing with him must ascertain the extent of the authority given, and cannot hold the principal responsible if the agent transcends his authority. The principal, however, may ratify an unauthorized act of his agent, and thus make himself responsible.

¹¹ It is a general principle that a master is responsible for the wrongful acts or torts which his servant commits within the scope of his authority, whereby injury is caused to third persons. By the word "*tort*" is meant any wrong, irrespective of contract, in violation of personal private rights, for which the law gives a right to bring a civil action for damages; as, *e. g.*, assault and battery, libel, slander, nuisance, trespass, fraud, negligence, etc. The extent of the servant's authority with reference to the master's liability, is not to be determined precisely by the instructions which he receives; for the master may be responsible, although the servant exceeds or disregards his instructions. (*Ochsenbein v. Shapley*, 85 N. Y. 214.)

† A servant is responsible to third persons for his own positive wrongs or trespasses. (*Harriman v. Stowe*, 57 Mo. 93; *Drake v. Kiely*, 93 Pa. St. 492.)

common law, if a servant kept his master's fire negligent y, so that his neighbor's house was burned down thereby, an action lay against the master; because this negligence happened in his

Whatever acts may be reasonably considered as incident to, or sanctioned by, the occupation in which the servant is employed, and are done by him with a view to the performance of his master's business, are to be deemed as within "the scope of his employment." To this extent, therefore, the servant will usually have a discretionary power; and although he exercises this discretion erroneously and injuriously, still if his purpose was the prosecution of his master's business, the master will be responsible. It was at one time maintained that a master was never liable for the *wilful* acts of his servants; but it is now held that wilful acts may be within the scope of the servant's authority, according to the principles just adverted to, so that the master may be held accountable. Thus, where an omnibus-driver had received orders from his employer not to race with, or obstruct the omnibuses of another line, but he did so with a view to injure the other line, it was held that although he acted wantonly and maliciously, yet as he had his employer's interest in view, and was engaged in the performance of his master's work, the employer was liable. (*Limpus v. London Omnibus Co.*, 1 H. & C. 526; *Howe v. Newmarch*, 12 Allen, 49.) But if the servant quits sight of the object for which he is employed, and without having in view the performance of his master's work or his master's benefit, does an act which his own malice or wilfulness suggests, he acts without the scope of his authority, and, though himself liable, does not bind the master. (*Mott v. Consumers' Co.*, 73 N. Y. 543.) So, if he is entrusted with means or facilities to perform his duty or service, but uses them for purposes of his own without regard to his master's work, the master is not liable; as if a servant is directed to use a horse and carriage in the delivery of certain articles, but drives in a wrong direction for his own pleasure. (L. R. 4 Q. B. 476; 12 Hun, 465; cf. 87 N. Y. 535.) The important test, therefore, in determining whether the master is liable, is not whether the act of the servant is wilful or not wilful, but whether the act is within the scope of the servant's employment, according to the sense of the phrase just indicated. But there are certain classes of cases, in which the application of this test is not of essential importance, but in which the master is nevertheless held responsible for injuries occasioned by the wrongful acts of his servants, though they acted entirely without regard to their duty. Such cases are the following:—

(a) Where the master has made a contract to do a certain thing, and his servants by their wrongful acts have prevented its fulfilment, though such acts be wilful and malicious. (*Weed v. Panama R. Co.*, 17 N. Y. 362; *Blackstock v. N. Y. & Erie R. Co.*, 20 N. Y. 48.) But the master is not liable if the servants have left his employ and are acting as "strikers." (*Geismer v. Lake Shore &c. R. Co.*, 102 N. Y. 563; see 89 Ind. 457.)

(b) Where the master is a common carrier of passengers, and therefore

service: otherwise, if the servant, going along the street with a torch, by negligence sets fire to a house; for there he is not in his master's immediate service; and must himself answer the

under the usual obligation of such carriers to use all such reasonable precautions as human judgment and foresight are capable of, to make his passengers' journey safe and comfortable. It is the carrier's duty to treat his passenger respectfully, and to protect him against the violence and insults, not only of strangers and co-passengers, but particularly of his own servants. If, therefore, the passenger is assaulted and insulted through the wilful misconduct of an employee, the master is responsible. This duty may be regarded, in one aspect, as flowing from an implied contract; so that the master would be liable on the same ground as in case (a) above. (*Goddard v. Grand Trunk R. Co.*, 57 Me. 202; 106 Mass. 180; 90 N. Y. 588; 121 U. S. 637.)

(c) Where the servant, by his wrongful act, creates a nuisance upon the master's premises, or does an act in the use or improvement of such premises, which causes a trespass to adjacent property; as, where servants are engaged in blasting upon their master's land, and stones and earth are thrown upon the adjacent premises. (*Hay v. Cohoes Co.*, 2 N. Y. 159.)

(d.) Where the master is a common carrier of goods or an innkeeper, and therefore absolutely responsible at common law for the safety of the goods entrusted to him, except from injuries occasioned by the act of God or the public enemy, and his servants occasion the loss or destruction of the goods, or injury to them. He may then be sued for the loss sustained, although the servants did the wrongful act wilfully.

It is important to distinguish between a *servant* and a *contractor*. The term "contractor" is used to designate a person who is not, like a servant, under the constant and immediate direction and control of his employer in the prosecution of the work which he is engaged to do, but who undertakes to accomplish a particular end or result, but himself controls the work during its progress; as, where one contracts to build a house, to dig a canal, etc. A contractor is usually a person engaged in an independent employment. It is a general rule that an employer is not responsible for the negligence or wrongful act of a contractor whom he employs, or of the contractor's servants or agents, but that the contractor is himself the party liable in such cases. (*Hexamer v. Webb*, 101 N. Y. 377; *Chicago v. Robbins*, 2 Black, 418.) So a contractor is not responsible for the acts of a sub-contractor whom he employs. But these rules are subject to the following qualifications:—

(a) The employer is liable when he personally interferes with the contractor's workmen, who obey his directions (1 C. B. 578; 1 Rob. 432); and also where he retains such control over the contractor as virtually makes the latter a servant for the time being. (137 Mass. 123; 15 Wall. 649.)

(b) The employer is liable where the act which the contractor is employed to do is itself unlawful; as where a contractor was employed to make an excavation in a public street, which the employer had no lawful authority to make, and a public nuisance was thus created. (*Ellis v. Sheffield Gas Co.*, 2 E. & B. 767; *Water Co. v. Ware*, 16 Wall. 566; see 61 N. Y. 178.)

(c) The employer is liable where he is under an absolute legal duty to do

damage personally. But now the common law is, in the former case, altered by statute 6 Ann. c. 3, which ordains that no action shall be maintained against any, in whose house or chamber any fire shall accidentally begin: for their own loss is sufficient punishment for their own or their servant's carelessness. But if such fire happens through negligence of any servant, whose loss is commonly very little, such servant shall forfeit 100*l.* to be distributed among the sufferers: and, in default of payment, shall be committed to some workhouse, and there kept to hard labor for eighteen months.¹² A master is, lastly, chargeable if any of his family layeth or casteth any thing out of his house into the street or common highway, to the damage of any individual, or the common nuisance of his majesty's liege people: for the master hath the superintendence and charge of all his household. And this also agrees with the civil law; which holds that the *pater familias*, in this and similar cases, "*ob alterius culpam tenetur, sive servi, sive liberi*."

*432] *We may observe, that in all the cases here put, the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer; he may frequently be answerable for his servant's misbehavior, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong.

a certain act, and intrusts its performance to a contractor who neglects or fails to accomplish it as directed; as, where a city is bound to keep the streets in a safe condition and commits to a contractor the work of filling an excavation in the highway, and he fails to do so, so that a person suffers injury. (*Brusso v. Buffalo*, 90 N. Y. 679; *Hughes v. Percival*, 8 App. Cas. 443.)

(d) The employer is liable if his premises are wrongfully left by the contractor, after the completion of the work, with a nuisance thereon, and he allows it to remain. (92 N. Y. 10; 144 Mass. 516.)

¹² It has been decided that the word "accidentally," in the statute of Anne, does not apply to fires caused by negligence, but only to cases where the fire originated without assignable or discoverable cause, or is attributable to the act of God: a master, therefore, would still be liable for a fire caused by his servant's negligence, and the common-law rule is not, as Blackstone states, altered in this respect by the statute. (*Filliter v. Phippard*, 11 Q. B. 347.) In some of the United States, this statute has been reënacted. In New York it is held to be a part of the common law. (*Lansing v. Stone*, 37 Barb. 15; see 49 N. Y. 420; 94 U. S. 469.)

CHAPTER V.

[BL. COMM.—BOOK I. CH. XV.]

Of Husband and Wife.

THE second private relation of persons is that of marriage, which includes the reciprocal rights and duties of husband and wife ; or, as most of our elder law books call them, of *baron* and *feme*. In the consideration of which I shall in the first place inquire, how marriages may be contracted or made ; shall next point out the manner in which they may be dissolved ; and shall, lastly, take a view of the legal effects and consequences of marriage.

I. Our law considers marriage in no other light than as a civil contract.¹ The *holiness* of the matrimonial state is left entirely to the ecclesiastical law : the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil

¹ " Marriage is a contract *sui generis*, and differing in some respects from all other contracts ; so that the rules of law which are applicable in expounding and enforcing other contracts, may not apply to this. The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The foundation of marriage, like that of all other contracts, rests on the consent of parties ; but it differs from other contracts in this, that the rights, obligations, or duties arising from it are not left entirely to be regulated by the agreements of parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control by any declaration of their will : it confers the *status* of legitimacy on children born in wedlock, with all the consequential rights, duties, and privileges thence arising ; it gives rise to the relations of consanguinity and affinity ; in short, it pervades the whole system of civil society. Unlike other contracts, it cannot, in general, amongst civilized nations, be dissolved by mutual consent ; and it subsists in full force, even though one of the parties should be forever rendered incapable, as in the case of incurable insanity, or the like, from performing his part of the mutual contract. No wonder that the rights, duties, and obligations arising from so important a contract should not be left to the discretion or caprice of the contracting parties, but should be regulated, in many important particulars, by the laws of every civilized country." (Per Lord Robertson, in *Duntze v Levett*, 3 Eng. Ec. 360. 495, 502 ; see *Maynard v. Hill*, 125 U. S. 190.)

inconvenience. The punishment, therefore, or annulling, of incestuous or other unscriptural marriages, is the province of the spiritual courts ; which act *pro salute animæ*.² And, taking it in this civil light, the law treats it as it does all other contracts : allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place *willing* to contract ; secondly, *able* to contract ; and, lastly, actually *did* contract, in the proper forms and solemnities required by law.³

434*] *First, they must be *willing* to contract. "*Consensus, non concubitus, facit nuptias*," is the maxim of the civil law in this case ; and it is adopted by the common lawyers, who indeed have borrowed, especially in ancient times, almost all their notions of the legitimacy of marriage from the canon and civil laws.⁴

² Jurisdiction in matrimonial causes was taken from the ecclesiastical courts by the statute 20 & 21 Vict., ch. 85 (1857), and vested in a special court, established by this act, known as the "Court for Divorce and Matrimonial Causes." By the act 36 & 37 Vict., ch. 66 [1873], it was provided that this court, together with the Court of Probate and the Court of Admiralty, should form the Probate, Divorce, and Admiralty division of the High Court of Justice, which this act established. In the United States, where there have never been any ecclesiastical courts, jurisdiction to annul marriages or grant divorces, etc., is usually vested in courts of equity, or courts having equitable powers.

³ Mutual promises to marry also constitute a contract, for a breach of which either of the parties thereto may sue the other and recover damages. No particular form of words is necessary to constitute such a contract : it is sufficient that the acts and language of the parties were such as clearly to indicate that they intended a mutual engagement, and understood it to exist, though no express request to marry was ever made by one of the other. (*Homan v. Earle*, 53 N. Y. 267.) It has been held that an action for breach of promise of marriage will lie at once, upon a positive refusal to perform the contract at any time, though the time specified for the performance has not arrived. (*Burtis v. Thompson*, 42 N. Y. 246.) In such actions evidence may be given in defence that the promise was procured by fraud, or that the plaintiff is of immoral or unchaste character, and that this was not known to the defendant at the time of the engagement. (*Palmer v. Andrews*, 7 Wend. 144 ; *Berry v. Bakeman*, 44 Me. 164 ; see 33 Minn. 231.)

⁴ A marriage ceremony, though actually and legally performed, when it was in jest and not intended to be a contract of marriage, and it was so understood at the time by both parties, and is so considered and treated by them, is not a contract of marriage. Intention is necessary, as in every other contract. (*McClurg v. Terry*, 21 N. J. Equity, 225.) So marriages procured by force, duress, or fraud, are invalid. (*Smith v. Smith*, 51 Mich. 607.) But the fraud must be such as goes to the essence of the contract. (*Moot v.*

Secondly, they must be *able* to contract. In general, all persons are able to contract themselves in marriage, unless they labor under some particular disabilities and incapacities. What those are, it will be here our business to inquire.

Now these disabilities are of two sorts ; first, such as are canonical, and therefore sufficient by the ecclesiastical laws to void the marriage in the spiritual court ; but these in our law only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained. Of this nature are pre-contract ; consanguinity, or relation by blood ; and affinity, or relation by marriage ; and some particular corporeal infirmities. And these canonical disabilities are either grounded upon the express words of the divine law, or are consequences plainly deducible from thence : it therefore being sinful in the persons who labor under them, to attempt to contract matrimony together, they are properly the object of the ecclesiastical magistrate's coercion ; in order to separate the offenders, and inflict penance for the offence, *pro salute animarum*. But such marriages not being void *ab initio*, but voidable only by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is actually made during the life of the parties.⁵ For, after

Moot, 37 Hun, 288.) If the deception be merely in regard to the social station, wealth, good health or disposition of one of the parties, it will not usually be sufficient to annul the contract. But if a woman be with child by another man at the time of her marriage, and deceives her betrothed husband in this regard, the marriage may be declared a nullity, unless he has himself had illicit relations with her. (13 Cal. 87 ; 3 Allen, 605 ; 40 N. J. Eq. 412 ; 97 Mass. 330.)

⁵ By statute 5 & 6 William IV., ch. 54 [1835-36], marriages between persons within the prohibited degrees are declared absolutely null and void. What these degrees are, is not stated by the statute ; that must be determined by the rules of the canon law and early statutes. Relationship both by consanguinity and by affinity, is still comprehended within the prohibition ; and marriage cannot, therefore, be contracted with a deceased wife's sister. (*Brook v. Brook*, 9 H. L. C. 193 ; *Queen v. Chadwick*, 11 Q. B. 173, 205.)

In the United States, marriages between persons related by consanguinity are prohibited, but not usually between persons related by affinity. This matter is regulated by the statutes of the several States upon the subject. Thus, in New York marriages between persons lineally related to each other in a direct line of ascent and descent, and between brothers and sisters, are declared incestuous and void. (2 R. S. 139.) In a number of the States, the prohibition is more wide-reaching in its scope, and forbids marriages with uncles, aunts, nephews, nieces, step-children, etc. Incest is also, as a general rule, declared to be a crime. (See *People v. Lake*, 110 N. Y. 61.)

the death of either of them, the courts of common law will not suffer the spiritual courts to declare such marriages to have been void ; because such declaration cannot now tend to the reformation of the parties. And therefore when a man had married his first wife's sister, and after her death the bishop's court was *435] *proceeding to annul the marriage and bastardize the issue, the court of king's bench granted a prohibition *quoad hoc* ; but permitted them to proceed to punish the husband for incest. These canonical disabilities being entirely the province of the ecclesiastical courts, our books are perfectly silent concerning them. But there are a few statutes, which serve as directories to those courts, of which it will be proper to take notice. By statute 32 Hen. VIII. c. 38, it is declared, that all persons may lawfully marry, but such as are prohibited by God's law ; and that all marriages contracted by lawful persons in the face of the church, and consummated with bodily knowledge, and fruit of children, shall be indissoluble. And, because in the times of popery, a great variety of degrees of kindred were made impediments to marriage, which impediments might however be bought off for money, it is declared, by the same statute, that nothing, God's law except, shall impeach any marriage, but within the Levitical degrees ; the farthest of which is that between uncle and niece. By the same statute all impediments arising from precontracts to other persons, were abolished and declared of none effect, unless they had been consummated with bodily knowledge : in which case the canon law holds such contract to be a marriage *de facto*. But this branch of the statute was repealed by statute 2 and 3 Edw. VI. c. 23. How far the act of 26 Geo. II. c. 33, which prohibits all suits in ecclesiastical courts to compel a marriage, in consequence of any contract, may collaterally extend to revive this clause of Henry VIII.'s statute, and abolish the impediment of precontract, I leave to be considered by the canonists.⁶

⁶ Disability by pre-contract is now declared to be abolished.

In regard to the "corporeal infirmities" or disabilities for which a marriage may be annulled, the following cases may be consulted : (*G. v. G.*, L. R. 2 P. & D. 287 ; *A. v. B.*, L. R. 1 P. & D. 559 ; *J. G. v. H. G.*, 33 Md. 401 ; *Devenbagh v. Devenbagh*, 5 Pai. 558.) In New York it is provided by statute that when either of the parties to a marriage shall be incapable, from physical causes, from entering into the marriage state, the marriage may be annulled by the

The other sort of disabilities are those which are created, or at least enforced, by the municipal laws. And, though some of them may be grounded on natural law, yet they are regarded by the laws of the land, not so much in the light of any moral offence, as on account of the civil inconveniences they drew after them. These civil disabilities make the contract void *ab initio*, and not merely voidable; not that they *dissolve a con- [*436 tract already formed, but they render the parties incapable of forming any contract at all: they do not put asunder those who are joined together, but they previously hinder the junction. And, if any persons under these legal incapacities come together, it is a meretricious, and not a matrimonial union.⁷

1. The first of these legal disabilities is a prior marriage, or having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void: polygamy being condemned both by the law of the New Testament, and the policy of all prudent states, especially in these northern climates. And Justinian, even in the climate of modern Turkey, is express, that "*duas uxores eodem tempore habere non licet.*"⁸

proper court. (2 R. S. 139.) Similar provisions exist in other States. The marriage is, therefore, not void but voidable.

⁷ The former distinctions between *void* and *voidable* marriages are now so far changed in England that of these various disabilities enumerated by Blackstone, both canonical and civil, all but two (viz., want of age and corporeal disability) render the marriage void *ab initio*, while these two render it voidable. But it has long been customary, in cases of insanity, and of force or fraud, to institute a judicial investigation to have the marriage declared null and void. (See also *Andrews v. Ross*, 14 P. D. 15.) If a marriage is voidable, it will remain valid until annulled by a competent court; but not, if void.

In the United States, these distinctions are still further changed and modified by the various statutes upon the subject. Thus, in New York, these causes render a marriage *void*. relationship within the prohibited degrees, and (with certain exceptions) polygamy; while these render it *voidable* only: want of age, insanity or idiocy, physical disability, the use of force or fraud in obtaining consent, and certain excepted cases of polygamy. (See 2 R. S. 139.) (See next note; also *Unity v. Belgrade*, 76 Me. 419.)

⁸ This subject is generally governed by statute in the United States. In New York polygamous marriages are declared void, unless one of the parties to a marriage has been absent for five successive years without being known to the other to be living, and such other party has married again in ignorance of this fact. (2 R. S. 139.) Then this second marriage is voidable. In other States there are statutes of a similar character, though in some, as

2. The next legal disability is want of age. This is sufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting; *a fortiori* therefore it ought to avoid this, the most important contract of any. Therefore if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is only inchoate and imperfect; and, when either of them comes to the age of consent aforesaid, they may disagree and declare the marriage void, without any divorce or sentence in the spiritual court.⁹ This is founded on the civil law. But the canon law pays a greater regard to the constitution, than the age, of the parties; for if they are *habiles ad matrimonium*, it is a good marriage, whatever their age may be. And in our law it is so far a marriage, that, if at the age of consent they agree to continue together, they need not be married again. If the husband be of years of discretion and the wife under twelve, when she comes to years of discretion, he may disagree as well as she may: for in contracts the obligation must be mutual; both must be bound, or neither: and so it is *vice versa*, when the wife is of years of discretion, and the husband under.¹⁰

*437] *3. Another incapacity arises from want of consent of parents or guardians. By the common law, if the parties themselves were of the age of consent, there wanted no other concurrence to make the marriage valid: and this was agreeable to the canon law. But, by several statutes, penalties of 100*l.* are laid on every clergyman who marries a couple either without publication of banns, which may give notice to parents or guardians, or without a license, to obtain which the consent of parents or guardians must be sworn to. And by the statute 4 and 5 Ph. and M. c. 8, whosoever marries any woman child under the age of sixteen years, without consent of parents or guardians, shall

in England, all bigamous marriages are made void. (See 45 N. J. Eq. 485; 121 Ill. 388.) Bigamy is also usually a crime punishable by indictment, except in such cases of absence of one of the parties.

⁹ In some States, the age of consent has been changed by statute, and the parties required to be older than at common-law. Thus in New York, the age is eighteen for males, sixteen for females.

¹⁰ But these rules only apply in case of an actual marriage contract, and not in reference to a contract to marry *in futuro*. The parties must be 21 years of age to render such a contract valid; and if one of the parties be over, and the other under this age, the adult will be bound, but the minor may avoid the agreement. (*Hunt v. Peake*, 5 Cow. 475; see 31 O. St. 521; 42 O. St. 23.)

be subject to fine, or five years' imprisonment: and her estate during the husband's life shall go to and be enjoyed by the next heir. The civil law indeed required the consent of the parent or tutor at all ages, unless the children were emancipated, or out of the parent's power: and if such consent from the father was wanting, the marriage was null, and the children illegitimate; but the consent of the mother or guardians, if unreasonably withheld, might be redressed and supplied by the judge, or the president of the province: and if the father was *non compos*, a similar remedy was given. These provisions are adopted and imitated by the French and Hollanders, with this difference: that in France the sons cannot marry without consent of parents till thirty years of age, nor the daughters till twenty-five; and in Holland, the sons are at their own disposal at twenty-five, and the daughters at twenty. Thus hath stood, and thus at present stands, the law in other neighboring countries. And it has lately been thought proper to introduce somewhat of the same policy into our laws, by statute 26 Geo. II., c. 33, whereby it is enacted, that all marriages celebrated by license (for banns suppose notice) where either of the parties is under twenty-one, (not being *a widow or widower, who are supposed eman- [*438 ripated,) without the consent of the father, or, if he be not living, of the mother or guardians, shall be absolutely void.¹¹ A like provision is made as in the civil law, where the mother or guardian is *non compos*, beyond sea, or unreasonably froward, to dispense with such consent at the discretion of the lord chancellor: but no provision is made, in case the father should labor under any mental or other incapacity. Much may be, and much has been, said both for and against this innovation upon our ancient laws and constitution. On the one hand, it prevents the clandestine marriages of minors, which are often a terrible inconvenience to those private families wherein they happen. On the other hand, restraints upon marriages, especially among

¹¹ These rules have been somewhat changed by recent statutes. It is now the rule that the parent or guardian, by publicly forbidding the banns or the solemnization, may prevent the banns from proceeding, or the marriage from taking place. But if the marriage of the minor be actually solemnized without such consent, it will nevertheless be valid. (Statutes 4 Geo. IV., ch. 76; 6 & 7 Will. IV., ch. 85.) In some States of this country, statutes have been passed requiring the consent of parents or guardians, but this is not generally the case.

the lower class, are evidently detrimental to the public, by hindering the increase of the people; and to religion and morality, by encouraging licentiousness and debauchery among the single of both sexes; and thereby destroying one end of society and government, which is *concubitu prohibere vago*. And of this last inconvenience the Roman laws were so sensible, that at the same time that they forbade marriage without the consent of parents or guardians, they were less rigorous upon that very account with regard to other restraints: for, if a parent did not provide a husband for his daughter, by the time she arrived at the age of twenty-five, and she afterwards made a slip in her conduct, he was not allowed to disinherit her upon that account, "*quia non sua culpa, sed parentum, id commisisse cognoscitur*."

4. A fourth incapacity is want of reason; without a competent share of which, as no other, so neither can the matrimonial contract, be valid.¹² It was formerly adjudged, that the issue of an idiot was legitimate, and consequently that his marriage was valid. A strange determination! since consent is absolutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to any thing. And therefore the civil law judged much more sensibly when it made such deprivations of *439] reason a previous impediment; *though not a cause of divorce, if they happened after marriage. And modern resolutions have adhered to the reason of the civil law, by determining that the marriage of a lunatic, not being in a lucid interval, was absolutely void. But as it might be difficult to prove the exact state of the party's mind at the actual celebration of the nuptials, upon this account, concurring with some private family reasons, the statute 15 Geo. II., c. 30, has provided that the marriage of lunatics and persons under phrenzies, if found lunatics under a commission, or committed to the care of trustees by any act of parliament, before they are declared of sound mind by the lord chancellor or the majority of such trustees, shall be totally void.

Lastly, the parties must not only be willing and able to contract, but actually must contract themselves in due form of law, to make it a good civil marriage. Any contract made, *per verba de presenti*, or in words of the present tense, and in case of cohabitation *per verba de futuro* also, between persons able to con-

¹² See *Unity v. Belgrade*, 76 Me. 419; *Stuckey v. Mathes*, 24 Hun, 461; *Cumington v. Belchertown*, 149 Mass. 223; 2 Kent's Comm. 76.

tract, was before the late act deemed a valid marriage to many purposes ; and the parties might be compelled in the spiritual courts to celebrate it *in facie ecclesiæ*.¹⁸ But these verbal con-

* But it has been decided, by recent cases in the House of Lords, that a contract of marriage made *per verba de presenti* was not sufficient to constitute a valid marriage by the common-law, but it must have been celebrated in the presence of a clergyman in holy orders. And it is not enough that the bridegroom is himself a clergyman, and performs the ceremony. (*Beamish v. Beamish*, 9 H. L. C. 274 [1861]; *Queen v. Millis*, 10 Cl. & F. 534.) But in the United States, where there is no established church, it has been generally held that a marriage made by mere words of agreement in the present tense would be valid, without the intervention of a clergyman, and also that if particular forms and ceremonies are prescribed by statute for the solemnization of marriage, these are directory merely and not compulsory. (See *Meister v. Moore*, 96 U. S. 76; *Gall v. Gall*, 114 N. Y. 109; *Comm. v. Stump*, 53 Penn. St. 132.) Of course, however, a formal celebration by a minister or a magistrate is the usual mode adopted. But in some States, a marriage is not valid unless the statutory forms are observed. (*Beverlin v. Beverlin*, 29 W. Va. 732; *Comm. v. Munson*, 127 Mass. 459.)

The proposition in the text, that a contract *per verba de futuro*, if followed by cohabitation, would constitute a valid marriage, has been denied in several States in this country, where the question has arisen for decision. (See *Cheney v. Arnold*, 15 N. Y. 345; *Duncan v. Duncan*, 10 Ohio, N. S. 181.) It is said that the ecclesiastical courts had jurisdiction to compel the due celebration of such marriages, but that, before such celebration, they were not valid at common-law. (See *Peck v. Peck*, 12 R. I. 485; *Cartwright v. McGown*, 121 Ill. 388.)

The English statutes referred to in the succeeding portion of the paragraph, regulated the forms of marriage until 1822. But they have been superseded by other acts similar in character, but less stringent in their requirements as to the necessary formalities. If the marriage be celebrated by the Established Church, it must be upon publication of banns, and the procurement of a license, the ceremony must be performed by a duly ordained clergyman, and the marriage must be attested by two witnesses. But persons who do not desire to conform to these rites, may be married according to their own religious usages, or by a civil ceremony. But certain preliminary proceedings are required to be taken before an officer known as the superintendent registrar, which stand in place of the banns and licenses of the Established Church ; and the presence of a civil registrar is required at the solemnization of the marriage, except in the cases of Quakers or Jews, and there must be two attesting witnesses. (Broom & Hadley's Comm. i. p. 533.)

It is a general rule that the validity of a marriage, unless it is contrary to the law of nature or public policy, is to be determined by the law of the place where the marriage is contracted. (90 N. Y. 602; 149 Mass. 226.) Formerly, persons in England, who desired to avoid an observance of the English marriage regulations, were wont to pass over the border into Scotland, and marry

tracts are now of no force, to compel a future marriage. Neither is any marriage at present valid, that is not celebrated in some parish church, or public chapel, unless by dispensation from the Archbishop of Canterbury. It must also be preceded by publication of banns, or by license from the spiritual judge. Many other formalities are likewise prescribed by the act; the neglect of which, though penal, does not invalidate the marriage. It is held to be also essential to a marriage, that it be performed by a person in orders; though the intervention of a priest to solemnize this contract is merely *juris positivi* and not *juris naturalis aut divini*: it being said that Pope Innocent the Third was the first who ordained the celebration of marriage in the *440] church; before *which it was totally a civil contract. And, in the times of the grand rebellion, all marriages were performed by the justices of the peace; and these marriages were declared valid, without any fresh solemnization, by stat. 12 Car. II. c. 33. But, as the law now stands, we may upon the whole collect, that no marriage by the temporal law is *ipso facto void*, that is celebrated by a person in orders,—in a parish church or public chapel, or elsewhere, by special dispensation,—in pursuance of banns or a license,—between single persons,—consenting,—of sound mind,—and of the age of twenty-one years;—or of the age of fourteen in males and twelve in females, with consent of parents or guardians, or without it, in case of widowhood. And no marriage is *voidable* by the ecclesiastical law, after the death of either of the parties; nor during their lives, unless for the canonical impediments of precontract, if that indeed still exists; of consanguinity; and of affinity, or corporeal imbecility, subsisting previous to their marriage.¹⁴

in an informal way at a place called Gretna Green. Hence such marriages were called “Gretna Green marriages;” but notwithstanding the intent of the parties, they were held valid. (S. P. L. R. 5 P. D. 94; 86 N. Y. 18.)

¹⁴ Where no prescribed ceremonial of marriage is absolutely necessary, marriage may often be proved by cohabitation, acknowledgment of the marriage by the parties themselves, reception of them as man and wife by their friends, common reputation, etc. (*Gall v. Gall*, 114 N. Y. 109.) But such evidence merely raises a presumption of marriage, and may be rebutted by other evidence. (*Clayton v. Wardell*, 4 N. Y. 230; *Appeal of Reading Co.*, 113 Pa. St. 204.) But on trials for bigamy and civil actions for criminal conversation, the marriage must be proved by direct evidence, and not by this indirect method. (*Hayes v. People*, 25 N. Y. 390; see 75 Me. 126; 45 N. J. Eq. 116; 88 N. Y. 546.)

II. I am next to consider the manner in which marriages may be dissolved ; and this is either by death, or divorce. There are two kinds of divorce, the one total, the other partial ; the one *a vinculo matrimonii*, the other merely *a mensa et thoro*. The total divorce, *a vinculo matrimonii*, must be for some of the canonical causes of impediment before mentioned, and those, existing *before* the marriage, as is always the case in consanguinity ; not supervenient, or arising *afterwards*, as may be the case in affinity or corporeal imbecility. For in cases of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio* ; and the parties are therefore separated *pro salute animarum* : for which reason, as was before observed, no divorce can be obtained, but during the life of the parties. The issue of such marriage as is thus entirely dissolved, are bastards.¹⁵

¹⁵ The English law upon the subject of divorce, is now so altered that a divorce *a vinculo*, may be obtained for causes arising after the marriage. It may be obtained by the husband on the ground of his wife's adultery ; by the wife, on the grounds that since the marriage, her husband has committed incestuous adultery, rape, or an unnatural crime, or has been guilty of bigamy with adultery, or of adultery coupled with cruelty, or with desertion for two years or more, without reasonable cause. And a judicial separation or divorce *a mensa et thoro* may be obtained by either party for adultery, or cruelty, or desertion without cause, for two years or upwards. (20 & 21 Vict., ch. 85 ; and see 41 Vict. c. 19.)

In the United States, the causes for total and partial divorce are particularly prescribed by the statutes of the several States, and there is no little diversity in their provisions upon this subject. In some States, as in New York, total divorce is permitted only for a single cause, viz., adultery ; while in others, it is obtainable for a variety of causes, as adultery, cruelty, desertion, failure to support, habitual drunkenness, conviction for crime, etc. In a number of the States, such causes (or some of them), other than adultery, are only grounds for partial divorce. In a suit for total divorce on the ground of adultery (or in some States for other causes), it will be generally a sufficient defense to prove (1) that the plaintiff has been guilty of the same offense ; this is called "recrimination ;" (2) that the offense has been *condoned or forgiven*, either expressly, or by voluntary cohabitation after knowledge of the fact ; (3) that the offense was committed through the procurement, connivance, or collusion of the plaintiff. A general denial of the commission of the offense is, of course, if established, a sufficient defense ; and, in some States, it is provided that the suit must be brought within a certain number of years (in New York, five years), in order that it may be maintainable. In States where there is no such positive rule established, unreasonable delay to bring suit will usually in the same way, be deemed a sufficient bar to the plaintiff's cause of

Divorce *a mensa et thoro* is when the marriage is just and lawful *ab initio*, and therefore the law is tender of dissolving *441] it; but, for some supervenient cause, it becomes improper or impossible for the parties to live together: as in the case of intolerable ill temper, or adultery, in either of the parties. For the canon law, which the common law follows in this case, deems so highly and with such mysterious reverence of the nuptial tie, that it will not allow it to be unloosed for any cause whatsoever, that arises after the union is made. And this is said to be built on the divine revealed law; though that expressly assigns incontinence as a cause, and indeed the only cause, why a man may put away his wife and marry another. The civil law, which is partly of pagan original, allows many causes of absolute divorce; and some of them pretty severe ones: as, if a wife goes to the theatre or the public games, without the knowledge and consent of the husband; but among them adultery is the principal, and with reason named the first. But with us in England adultery is only a cause of separation from bed and board: for which the best reason that can be given, is, that if divorces were allowed to depend upon a matter within the power of either of the parties, they would probably be extremely frequent; as was the case when divorces were allowed for canonical disabilities, on the mere confession of the parties, which is now prohibited by the canons. However, divorces *a vinculo matrimonii*. If these defenses are sustained by proof, a divorce will not be granted in favor of the complainant. So in suits for partial divorce, similar defenses are commonly permissible; viz., denial, recrimination, condonation, adultery of the plaintiff, and delay to prosecute within the proper time. In some States, there are statutory provisions in regard to these defenses.

Foreign divorces, *i.e.* those granted in other States or countries, are generally deemed valid, if granted by courts having jurisdiction of the parties and subject-matter. (115 Mass. 438; 108 N. Y. 415; 42 N. J. Eq. 152; 8 App. Cas. 43.)

It is important to notice the distinction between annulling a marriage for causes existing previous to its celebration, and dissolving it for causes arising afterwards. The former is a case of *nullity* of the marriage, the latter a case of *dissolution*. The effect of the former is that the marriage contract is deemed to have been void from the beginning, so that (unless some statute provides to the contrary) any children born are illegitimate: but, in the latter case, the marriage is perfectly valid until the divorce is obtained; and all children born before the divorce, or within a reasonable time afterwards, are legitimate. These rules apply under the English, as well as the American law. But partial divorce is not a case of dissolution of the marriage; and the parties are deemed to be still husband and wife, though living apart by judicial decree.

rimonii, for adultery, have of late years been frequently granted by act of parliament.¹⁶

In case of divorce *a mensa et thoro*, the law allows alimony to the wife, which is that allowance which is made to a woman for her support out of the husband's estate : being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case.¹⁷ This is sometimes called her *estovers*, for which, if he refuses payment, there is, besides the ordinary process of excommunication, a writ at common law *de estoveriis habendis*, in order to recover it. It is generally proportioned to the rank and quality of *the parties. But in [*442 case of elopement, and living with an adulterer, the law allows her no alimony.

III. Having thus shown how marriages may be made, or dis-

¹⁶ In New York and many other States, the legislatures are prohibited by the State constitutions from granting divorces, and such power is vested only in the courts. But the legislative power still exists where it is not so prohibited. (125 U. S. 190.)

¹⁷ Alimony is now granted in cases both of total and partial divorce for causes arising after the marriage. It is of two kinds, alimony *pendente lite*, and permanent alimony : the former being given to the wife to provide for her support during the pendency of the suit, and usually with a further allowance for counsel fees and expenses (80 N. Y. 1 ; 120 Pa. St. 320) ; while the latter is given upon the termination of the suit, when a decree is rendered in her favor as against her husband, and is intended as a provision for her permanent support. There is no fixed rule in regard to the amount of alimony to be awarded. This rests in the discretion of the court. The amount will vary with the special circumstances of each case ; as, the rank and condition of the parties, the fortune of the husband, the necessities of the wife, etc. As a general rule, temporary alimony will be limited to the wife's reasonable wants to afford her a suitable and comfortable subsistence. (*Burgess v. Burgess*, 25 Ill. App. 525.) But it has been held that it might, if necessary, include a sufficient sum to enable the wife to pass the winter in a tropical climate, if her health required it. (*Lynde v. Lynde*, 4 Sandf. Ch. 373.) As permanent alimony, it is usual to allow one-third or one-fourth of the husband's annual income. But in special cases, this sum may be increased or diminished, as circumstances may seem to require. An investigation is held to determine the amount and value of his property, his yearly income, etc. ; and it is usual to require him to give reasonable security, if considered necessary, for the payment of the allowance awarded to his wife. But if divorce be granted in the husband's favor as against the wife, permanent alimony will not be awarded her. (See *Burr v. Burr*, 7 Hill, 207 ; *Waring v. Waring*, 100 N. Y. 570 ; *Barrett v. Barrett*, 41 N. J. Eq., 139 ; *Robinson v. Robinson*, 79 Cal. 511.) Usually, by statute, the court may also determine as to custody of children and, in proper cases, require the husband to provide for their support. (96 N. Y. 456 ; 90 Ind. 107.)

solved, I come now, lastly, to speak of the legal consequences of such making, or dissolution.

By marriage, the husband and wife are one person in law ; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband ; under whose wing, protection, and *cover*, she performs everything ; and is therefore called in our law-french a *feme-covert*, *fœmina viro co-operta* ; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord ; and her condition during her marriage is called her *coverture*. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely *personal*. For this reason, a man cannot grant any thing to his wife, or enter into covenant with her ; for the grant would be to suppose her separate existence ; and to covenant with her, would be only to covenant with himself ; and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage.¹⁸

¹⁸ By the common-law also the husband became entitled, by marriage, to all the personal property of his wife ; to the rents and profits of her lands ; and if she owned any rights of action against others (termed “ *choses in action* ”), he might reduce them to possession by collecting the amount due, selling the claim, etc., and was entitled to the proceeds. But these rules in regard to the right of husband and wife to make conveyances and agreements between themselves, and in reference to the wife’s property, must be strictly understood as principles of the *common-law*, since in courts of *equity* the same disabilities do not exist. In equity the wife may hold property, vested in trustees, to her sole and separate use, and thus have the entire beneficial ownership of it, free from the control and management of her husband, and the right to transfer such beneficial ownership to others. She may also bind her separate estate for the payment of debts which she incurs. Moreover, the husband may covenant with others as trustees for the benefit of his wife, or convey property to them to be held for her use. A conveyance may even be made in equity directly between husband and wife, if for valuable consideration, and not prejudicial to the interests of creditors.

Within recent years the rules of the common-law, in regard to husband and wife, have been to a large extent changed by statute. Both in England and in many of the American States, married women have been thus empowered to hold real and personal property, with the same right of management, control, and disposition as single women would have ; to carry on business on their own account, and for their own exclusive benefit ; to perform labor and

A woman indeed may be attorney for her husband;¹⁹ for that implies no separation from, but is rather a representation of, her lord. And a husband may also bequeath any thing to his wife by will; for that cannot take effect till the coverture is determined by his death. The husband is bound to provide his wife with necessaries by law, as much as himself; and, if she contracts debts for them, he is obliged to pay them; but for any thing besides necessaries he is not chargeable.²⁰ Also if a wife

services in their own behalf, and be entitled to the earnings thus gained as their separate property; to make contracts in relation to their separate property and the conduct of their business, which will be enforceable at law, etc. The tendency of modern legislation is to remove many of the disabilities under which married women rested at common-law. But this legislation exhibits so many diverse features that a passing reference to it is all that is here practicable. The statutes of the several States must be specially consulted. The recent English statute on the subject is 45 & 46 Vict. c. 75 [1882].

¹⁹ The wife may not only act as the agent of her husband, but any subsequent acknowledgment or ratification of her acts by him is evidence of, and equivalent to, an original authority. (*Edgerton v. Thomas*, 9 N. Y. 40; *Gates v. Brower*, 9 N. Y. 205.) So the husband may act as agent of the wife. (*Noel v. Kinney*, 106 N. Y. 74; *Wheaton v. Trimble*, 145 Mass. 345.)

²⁰ If husband and wife live together and he neglects or refuses to supply her with necessaries suitable to their condition and station in life, she may purchase them upon his credit and he will be liable therefor to tradesmen; and if she is manager of his household, as is usual, this creates a presumption of her right to procure upon his credit necessary household supplies. (*Alley v. Winn*, 134 Mass. 77; *Debenham v. Mellon*, 6 App. Cas. 24; *Kegney v. Owens*, 18 N. Y. St. Rep. 482; *Wagner v. Nagel*, 33 Minn. 348.) So if a husband ratify a purchase already made by his wife, this will render him liable. (*Conrad v. Abbott*, 132 Mass. 330.) A husband is, moreover, entitled to the benefit of his wife's earnings and services, unless this rule is changed by modern statutes. (*Coleman v. Burr*, 93 N. Y. 17.) The husband may, however, if he chooses, expressly prohibit any one from selling necessaries to his wife; and if he do so, no one, having notice of such prohibition, may trust the wife in reliance upon his credit, unless the husband so neglects his own duty that supplies become absolutely necessary according to their condition. It is indispensable, where the vendor has been forbidden to sell upon the wife's request on the husband's credit, that the vendor show, not only that the goods were in their nature suitable and necessary, but that the husband neglected his duty to provide supplies, and that, for that reason, they were necessary. (*Keller v. Phillips*, 39 N. Y. 351; *Woodward v. Barnes*, 43 Vt. 330; *Cromwell v. Benjamin*, 41 Barb. 558.) Where a party contracts solely with, and gives credit to, the wife, he cannot sue the husband, though for necessaries, unless the husband shows by some act that he considers himself the debtor. (*Tiemeyer v. Turnquist*, 85 N. Y. 516; *Bugbee v. Blood*, 48 Vt. 497.)

Where the husband and wife *are separated* and live apart from each

*443] elopes, and lives with another man, the husband *is not chargeable even for necessities; at least if the person who furnishes them is sufficiently apprised of her elopement. If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together. If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own; neither can she be sued without making the husband a defendant. There is indeed one case where the wife shall sue and be sued as a feme sole, viz., where the husband has abjured the realm, or is banished, for then he is dead in law; and, the husband being thus disabled to sue for or defend the wife, it would

other, still the husband will be liable upon a contract for *necessaries* made with her where his assent can be presumed. Thus, where the husband deserts his wife or turns her away without any reasonable ground, or refuses to admit her into his house, or compels her, by ill-usage, adultery, or severity, to leave him, he gives his wife a general credit, and is liable to be sued for necessities furnished her. (134 Mass. 418; 49 Ct. 450; 1 Sandf. 483.) And this, although he has given a general notice to all persons, or even a particular one to the individual supplying her with necessities, not to give credit to her. But where a husband professes to provide for his wife, who lives apart from him, it is incumbent on one who has been expressly forbidden to give her credit, in order to render the husband liable, to show affirmatively that the husband did not supply her with necessities suitable to her condition. (8 Wend. 544.)

If the wife leave her husband, *without just cause*, he is not liable for her maintenance: in an action against him for necessities, the plaintiff must prove that the separation took place by reason of his misconduct. (132 Mass. 181; 4 Denio, 46.) But even in such a case, if the wife, having been guilty of no misconduct, offers to return and he refuses to receive her, his liability will revive. (12 Johns. 293.) If, however, the wife leaves the husband without cause and commits adultery, or elopes, though not with an adulterer, the husband's responsibility will cease. (11 Johns. 281.) But if, after knowledge of her criminality, he again receives her into his house, his liability for necessities again revives. And if he turned her away for adultery, at which he himself connived, he is liable for her support. (20 Q. B. D. 354; 59 N. H. 106.)

Sometimes, husband and wife live apart by *mutual consent and agreement*, and it is the usual practice in such cases for him to make some particular provision for her support. If this is done, and the allowance is duly paid, he will not be liable for necessities furnished to her. (8 Johns. 72.) But if no provision is made for her maintenance, or, if agreed upon, is not properly paid, he will be liable for necessities. (See 12 Johns. 248; 118 N. Y. 7; 134 Mass. 77.) A husband's duty to support his wife is often enforceable under modern statutes by other means than tradesmen's suits. (66 Ia. 378; 140 Mass. 560; 88 N. Y. 513.)

be most unreasonable if she had no remedy, or could make no defense at all.²¹ In criminal prosecutions it is true, the wife may be indicted and punished separately; for the union is only a civil union. But in trials of any sort they are not allowed to be evidence for, or against, each other: partly because it is impossible their testimony should be indifferent, but principally because of the union of person; and therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of law, "*nemo in propria causa testis esse debet*;" and if against each other, they would contradict another maxim, "*nemo tenetur seipsum accusare*."²² But, where the offense is directly against the person of the wife, this rule has been usually dispensed with; and therefore, by statute 3 Hen. VII. c. 2, in case a woman be forcibly taken away, and married, she may be a witness against such her husband, in order to convict him of felony. For in this case she can with no propriety be reckoned his wife; because

²¹ The "Married Women's Property Act" in England (45 & 46 Vict. c. 75) provides that a married woman shall be liable to the extent of her separate property for her ante-nuptial debts, contracts, and wrongs, and she may be sued therefor and the judgment satisfied out of such property. But the husband is liable for such debts, etc., to the extent of the property which he acquires from her or becomes entitled to; and both may be sued upon claims existing wholly or partly against both. A married woman may now, as a general rule, sue and be sued like a *feme sole* and her husband need not be joined.

In the United States, the rules of the common-law in regard to actions, both upon contract and upon tort, still prevail, so far as unchanged by statute. But in many States, it has been provided that married women may sue and be sued, in a variety of cases, in their own names; and that judgments recovered by them may be enforced for their own personal benefit, and that judgments against them may be enforced against their separate property. Especially is this true with respect to actions concerning their separate property, separate business, and personal earnings. But for the wife's personal torts it is still necessary in a number of the States to sue husband and wife together.

²² Even by the common-law, the evidence of the wife is admissible against the husband in some cases; as, when he is on trial for a personal injury, as an assault and battery, committed upon her. Thus, when the husband was prosecuted for giving poison to his wife with intent to kill, she was held to be a competent witness against him. (*People v. Northrup*, 50 Barb. 147.) This is from the necessity of the case, since it might often happen that no other testimony would be procurable. (See 58 Wis. 674.)

This rule, prohibiting husband and wife from being witnesses for or against each other, has been, to a considerable extent, changed in modern times by statute. Thus in many States they may so testify in *civil actions*, except that they cannot disclose confidential communications or give evidence of each other's adultery. In some States husband or wife of a defendant in a *criminal case* may testify. (*Stickney v. Stickney*, 131 U. S. 227; *Raynes v. Bennett*, 114 Mass. 424; N. Y. Code Civ. Pro. § 831; N. Y. Penal Code, § 715.)

a main ingredient, her consent, was wanting to the contract ; and also there is another maxim of law, that no man shall take advantage of his own wrong ; which the *ravisher here would do, if by forcibly marrying a woman, he could prevent her from being a witness, who is perhaps the only witness to that very fact.

In the civil law the husband and the wife are considered as two distinct persons, and may have separate estates, contracts, debts, and injuries, and therefore in our ecclesiastical courts, a woman may sue and be sued without her husband.

But though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered ; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void ; except it be a fine, or the like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary.²³ She cannot by will devise lands to her husband, unless under special circumstances ; for at the time of making it she is supposed to be under his coercion.²⁴ And in some felonies, and other inferior crimes, committed by her, through constraint of her husband, the law excuses her, but this extends not to treason or murder.

The husband also, by the old law, might give his wife moderate correction.²⁵ For, as he is to answer for her misbehavior,

²³ It is now a general rule, that married women may convey their real estate by an ordinary deed, instead of by a fine as formerly ; but they are usually required upon a private examination, separate and apart from their husbands, to acknowledge that they execute the deed freely, without any fear or compulsion of their husbands, and the notary makes a certificate to that effect upon the deed. The husband should join in the deed with the wife. (*Hitz v. Jenks*, 123 U. S. 297 ; *Delafield v. Brody*, 108 N. Y. 524.)

²⁴ A married woman could not at common-law make a will of lands, but could of personal property with the husband's consent. The power to devise lands was given by statute in the reign of Henry VIII., out of which married women were expressly excepted. But the same purpose might be accomplished through the medium of a "power," so called, which was an authority contained in an instrument settling property to her separate use, empowering her to make an appointment of the property by will, to take effect at her death. But in recent times married women have, in a number of States, been vested by statute with power to make wills of their separate property, both real and personal.

²⁵ The right of the husband to inflict corporal chastisement upon the wife has been, in modern times, denied. (*People v. Winters*, 2 Parker Cr. Rep.

the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children ; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife, *aliter quam ad virum, ex causa regiminis et castigationis uxoris suæ, licite et rationabiliter pertinet*. The civil law gave the husband the *same, or a larger, authority over [*445 his wife ; allowing him, for some misdemeanors, *flagellis et fustibus acriter verberare uxorem* ; for others, only *modicam castigationem adhibere*. But with us, in the politer reign of Charles the Second, this power of correction began to be doubted, and a wife may now have security of the peace against her husband, or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege ; and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehavior.

These are the chief legal effects of marriage during the coverture ; upon which we may observe, that even the disabilities which the wife lies under are for the most part intended for her protection and benefit : so great a favorite is the female sex of the laws of England.

10.) It is not allowable though the wife be drunk or insolent. (*Commonwealth v. McAfee*, 108 Mass. 458.) Both husband and wife are liable to prosecution for assault and battery upon each other ; and now in England they may sue each other or institute criminal proceedings against each other for injuries done by the one to the other's property. (45 & 46 Vict. c. 75, s. 12.)

CHAPTER VI.

[BL. COMM.—BOOK I. CH. XVI.]

Of Parent and Child.

THE next, and the most universal relation in nature, is immediately derived from the preceding, being that between parent and child.

Children are of two sorts ; legitimate, and spurious or bastards, each of which we shall consider in their order ; and, first, of legitimate children.

1. A legitimate child is he that is born in lawful wedlock, or within a competent time afterwards. "*Pater est quem nuptiæ demonstrant*," is the rule of the civil law, and this holds with the civilians, whether the nuptials happen before or after the birth of the child. With us in England the rule is narrowed, for the nuptials must be precedent to the birth ; of which more will be said when we come to consider the case of bastardy. At present let us inquire into, 1. The legal duties of parents to their legitimate children. 2. Their power over them. 3. The duties of such children to their parents.

1. And, first, the duties of parents to legitimate children ; which principally consist in three particulars ; their maintenance, their protection, and their education.

***447]** *The duty of parents to provide for the *maintenance* of their children, is a principle of natural law ; an obligation, says Puffendorf, laid on them not only by nature herself, but by their own proper act, in bringing them into the world : for they would be in the highest manner injurious to their issue, if they only gave their children life that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect *right* of receiving maintenance from their parents. And the president Montesquieu has a very just observation upon this head : that the establish-

ment of marriage in all civilized states is built on this natural obligation of the father to provide for his children ; for that ascertains and makes known the person who is bound to fulfil this obligation : whereas, in promiscuous and illicit conjunctions, the father is unknown ; and the mother finds a thousand obstacles in her way, shame, remorse, the constraint of her sex, and the rigor of laws, that stifle her inclinations to perform this duty ; and, besides, she generally wants ability.

The municipal laws of all well-règulated states have taken care to enforce this duty : though Providence has done it more effectually than any laws, by implanting in the breast of every parent that natural *σρόρην*, or insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish.

The civil law obliges the parent to provide maintenance for his child ; and, if he refuses, "*judex de ea re cognoscet.*" Nay, it carries this matter so far, that it will not suffer a parent at his death totally to disinherit his child, without expressly giving *his reason for so doing ; and there are fourteen such reasons reckoned up, which may justify such disinherison. If the parent alleged no reason, or a bad, or a false one, the child might set the will aside, *tanquam testamentum inofficiosum*, a testament contrary to the natural duty of the parent. And it is remarkable under what color the children were to move for relief in such a case : by suggesting that the parent had lost the use of his reason when he made the *inofficious* testament. And this, as Puffendorf observes, was not to bring into dispute the testator's power of disinheriting his own offspring, but to examine the motives upon which he did it ; and, if they were found defective in reason, then to set them aside. But perhaps this is going rather too far ; every man has, or ought to have, by the laws of society, a power over his own property ; and, as Grotius very well distinguishes, natural right obliges to give a *necessary* maintenance to children ; but what is more than that they have no other right to, than as it is given them by the favor of their parents, or the positive constitutions of the municipal law.

Let us next see what provision our own laws have made for this natural duty. It is a principle of law, that there is an obligation on every man to provide for those descended from his

loins; and the manner in which this obligation shall be performed is thus pointed out.¹ The father and mother, grand-

¹ The question whether a father is under a legal obligation, irrespective of the duty imposed by statute, to provide for the necessary maintenance of his minor children, has led to a noteworthy conflict of opinion and adjudication in the courts of different States. In England, and in a number of the States of this country, it is maintained that the *moral duty* in such cases to provide proper support does not constitute a *legal duty*, enforceable by action; and the only ground, therefore, on which a father who has neglected or refused to furnish maintenance can be made responsible for necessities furnished to the child by others, is that the child has an express or implied agency from the father to make such contracts. "If a father," it is said, "does any specific act from which it may reasonably be inferred that he has authorized his son to contract a debt, he may be liable in respect of the debt so contracted; but the mere moral obligation on the father to maintain his child, affords no inference of a legal promise to pay his debts." (*Mortimore v. Wright*, 6 M. & W. 482.) "If a father turns his son upon the world, the son's only resource, in the absence of anything to show a contract on the father's part, is to apply to the parish, and then the proper steps will be taken to enforce the performance of the parent's legal duty." (*Shelton v. Springett*, 11 C. B. 452.) There is, therefore, under this doctrine, an important difference between a husband's obligation to support his wife, and that of a father to support his child, since, as has been seen, if a husband "turns his wife upon the world," she has a right to incur bills with tradesmen upon his credit for all necessities, and he will be held responsible. But under this English rule, slight circumstances are fastened upon as indicating an implied agency vested in the child, so as to render the father liable; as if, for example, a boy should buy a new suit of clothes, and the father should afterwards see him wear them, and make no objection nor offer to return them to the tradesman. (See *Fluck v. Tollemache*, 1 C. & P. 5; *Gordon v. Potter*, 17 Vt. 350; *Raymond v. Loyl*, 10 Barb. 483; *Kelley v. Davis*, 49 N. H. 187; *Freeman v. Robinson*, 38 N. J. L. 383; *Ramsey v. Ramsey*, 23 N. E. Rep. (Ind.) 69; also 19 Abb. N. C. 190; 44 N. W. Rep. (Mich.) 338.)

But in other States of this country, the view is taken that the father is under a legal obligation, irrespective of such relation of agency; and if, therefore, he does not provide necessities for the child's support, according to his means, the child may procure them from tradesmen or others upon the father's credit; as if, for instance, the father should drive his son from home without cause by cruel treatment. This rule, however, is subject to similar qualifications as in the law of husband and wife; and if the father himself duly supplies necessities, a tradesman who, in ignorance thereof, supplies like articles, cannot recover. (*Brow v. Brightman*, 136 Mass. 187; *Gilley v. Gilley*, 79 Me. 292; *Pretzinger v. Pretzinger*, 45 O. St. 452; *Porter v. Powell*, 44 N. W. Rep. (Iowa) 295; see 13 Johns. 280; 2 Cush. 347, 353; 33 Penn. St. 50.) So if a minor voluntarily leaves his father's house without cause, he cannot pledge his father's credit for necessities. (*Weeks v. Merrow*, 40 Me. 151; see *Tyler v. Arnold*, 47 Mich. 564.) A mother is not bound to support her minor children while the father is living. (*Gleason v. Boston*, 144 Mass. 25.)

Courts of equity have long exercised a salutary jurisdiction over cases of this kind; and if the child is entitled to property of its own, and the father is either wholly impoverished, or is in comparatively reduced circumstances, so that providing support would embarrass him, these courts will generally make an allow-

father and grandmother, of poor impotent persons, shall maintain them at their own charges, if of sufficient ability, according as the quarter session shall direct: and if a parent runs away, and leaves his children, the churchwardens and overseers of the parish shall seize his rents, goods, and chattels, and dispose of them toward their relief. (a) By the interpretations which the courts of law have made upon these statutes, if a mother or grandmother marries again, and was before such second marriage of sufficient ability to keep the child, the husband shall be charged to *maintain it: for, this being a debt of hers when [*449 single, shall like others extend to charge the husband.² But at her death, the relation being dissolved, the husband is under no farther obligation.

No person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease, or accident, and then is only obliged to find them with necessaries, the penalty on refusal

(a) Statutes 43 Eliz. ch. 2; 5 Geo. I. ch. 8.

ance for the child's support out of his own property: the income is usually applied to this purpose, so far as may be deemed reasonable and necessary. (*Ex parte Kane*, 2 Barb. Ch. 375; *Rice v. Tonnele*, 4 Sandf. Ch. 568.) This may even be done when the father is a man of some means, but the child's property is considerably more ample, for the court considers in these cases the permanent interest and welfare of the child, with reference to his station in life and probable career. (*Ex parte Burke*, 4 Sandf. Ch. 617; see 96 N. Y. 201, 220; 63 N. H. 14.)

Similar statutes to that referred to in the text are to be found in most of the United States, whose purpose is to prevent children from becoming a charge upon the town or parish, by requiring their parents to support them. The statute 43d Elizabeth, ch. 2, upon this subject became generally a part of the common-law of this country. In some States it has been re-enacted, in others superseded by subsequent enactments of similar purport.

² But now by statute 4 & 5 Will. IV. ch. 76, a man marrying a woman who has children at the time of such marriage, is compelled to support them until they become sixteen, or until the death of the mother, whether they are legitimate or illegitimate.

It is a common-law rule that a step-father is not entitled to the custody or services of the children of his wife by a former husband, nor is he bound to maintain them. But if he receives them into his family and supports them, they cannot sue him for the value of their services, though this may exceed the cost of their support, nor will they be liable for the necessaries he supplies. (*Williams v. Hutchinson*, 3 N. Y. 312; *Gerdes v. Weiser*, 54 Ia. 591.) This rule also applies to children remaining in their father's family after they become of age, but may be varied by contract. (60 Mich. 635; 99 Pa. St. 552; 57 Wis. 13; see 117 N. Y. 131.)

being no more than 20s. a month.³ For the policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence: but thought it unjust to oblige the parent against his will, to provide them with superfluities, and other indulgences of fortune; imagining they might trust to the impulse of nature, if the children were deserving of such favors. Yet, as nothing is so apt to stifle the calls of nature as religious bigotry, it is enacted, that if any popish parent shall refuse to allow his protestant child a fitting maintenance, with a view to compel him to change his religion, the lord chancellor shall by order of court constrain him to do what is just and reasonable. But this did not extend to persons of another religion, of no less bitterness and bigotry than the popish: and therefore in the very next year we find an instance of a Jew of immense riches, whose only daughter, having embraced Christianity, he turned her out of doors; and, on her application for relief, it was held she was entitled to none. But this gave occasion to another statute, which ordains, that if Jewish parents refuse to allow their protestant children a fitting maintenance suitable to the fortune of the parent, the lord chancellor on complaint may make such order therein as he shall see proper.⁴

Our law has made no provision to prevent the disinheriting *450] of children by will; leaving every man's property in his *own disposal, upon a principle of liberty in this as well as every other action: though perhaps it had not been amiss if the parent had been bound to leave them at least a necessary subsistence. Indeed, among persons of any rank or fortune, a competence is generally provided for younger children, and the bulk of the estate settled upon the eldest, by the marriage-articles. Heirs also, and children, are favorites of our courts of justice, and cannot be disinherited by any dubious or ambiguous words; there being required the utmost certainty of the testator's intentions to take away the right of an heir.

From the duty of maintenance we may easily pass to that of

³The amount of the penalty is now fixed by the justices. It is now provided by statute that a parent who wilfully neglects to provide sufficient necessaries for his child, who is in his custody and under 14 years of age, shall be criminally responsible. (31 & 32 Vict. ch. 122; see N. Y. Code Crim. Pro. § 899; N. Y. Penal Code, § 288.)

⁴These statutes are no longer in force.

protection, which is also a natural duty, but rather permitted than enjoined by any municipal laws : natural in this respect, working so strongly as to need rather a check than a spur. A parent may by our laws maintain and uphold his children in their lawsuits, without being guilty of the legal crime of maintaining quarrels. A parent may also justify an assault and battery in defence of the persons of his children : nay, where a man's son was beaten by another boy, and the father went near a mile to find him, and there revenged his son's quarrel by beating the other boy, of which beating he afterwards unfortunately died, it was not held to be murder, but manslaughter merely. Such indulgence does the law show to the frailty of human nature, and the workings of parental affection.

The last duty of parents to their children is that of giving them an *education* suitable to their station in life : a duty pointed out by reason, and of far the greatest importance of any.⁵ For, as Puffendorf very well observes, is it not *easy to imagine [*451 or allow, that a parent has conferred any considerable benefit upon his child by bringing him into the world ; if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself. Yet the municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children. Perhaps they thought it punishment enough to leave the parent, who neglects the instruction of his family, to labor under those griefs and inconveniences which his family, so uninstructed, will be sure to bring upon him. Our laws, though their defects in this particular cannot be denied, have in one instance made a wise provision for breeding up the rising generation : since the poor

⁵ This is said to be a duty of imperfect obligation, since it is not legally enforceable, but must be left to the discretion and prudence of parents, and their affection for their children. In the United States, very ample facilities are afforded in nearly all the States for the education of children by public schools. In some of the States, education has been made compulsory by statute. Thus, it is provided in New York, by a recent enactment, that children between 8 and 14 years of age must be sent to some public or private school at least 14 weeks in each year, of which eight shall be consecutive, or be instructed at home for the same period, in spelling, reading, writing, English grammar, geography and arithmetic, if the children's health will permit. (Laws of 1874, ch. 421 ; for the English law, see 39 & 40 Vict. c. 79 ; 43 & 44 Vict. c. 23.)

and laborious part of the community, when past the age of nurture, are taken out of the hands of their parents, by the statutes for apprenticing poor children ; and are placed out by the public in such a manner, as may render their abilities, in their several stations, of the greatest advantage to the commonwealth. The rich, indeed, are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family. Yet in one case, that of religion, they are under peculiar restrictions ; for it is provided, that if any person sends any child under his government beyond the seas, either to prevent its good education in England, or in order to enter into or reside in any popish college, or to be instructed, persuaded, or strengthened in the popish religion ; in such case, besides the disabilities incurred by the child so sent, the parent or person sending, shall forfeit 100*l.*, which shall go to the sole use and benefit of him that shall discover the offense. And if any parent, or other, shall send or convey any person beyond the sea, to enter into, or be resident in, or trained up in, any priory, abbey, nunnery, popish university, college, or school, or house of jesuits, or priests, or in any private popish family, in order to be instructed, persuaded, or *452] confirmed in the *popish religion, or shall contribute any thing towards their maintenance when abroad by any pretext whatever, the person both sending and sent shall be disabled to sue in law or equity, or to be executor or administrator to any person, or to enjoy any legacy or deed of gift, or to bear any office in the realm, and shall forfeit all his goods and chattels, and likewise all his real estate for life.⁶

2. The *power* of parents over their children is derived from the former consideration, their duty : this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it.† And upon this score the municipal laws of some nations have given a much larger authority to the parents than others. The ancient Roman laws gave the father a power of life and death over his children ; upon this principle, that he who gave had also the power of taking away. But the rigor of these laws was softened by subsequent constitutions ; so that we find a father banished by the Emperor Hadrian for killing

⁶ These restrictions have since been removed by statute.

† The right of a father to the *custody* of his infant children was formerly carried to an extreme by the courts, even as against the mother. But under modern statutes and decisions the general rule is to consider the welfare and benefit of the infant in awarding custody. (13 Q. B. D. 614; 74 N. Y. 299; 61 Ia. 198; 103 Ind. 569; 45 N. J. Eq. 283.)

his son, though he had committed a very heinous crime, upon this maxim, that "*patria potestas in pietate debet, non in atrocitate, consistere.*" But still they maintained to the last a very large and absolute authority : for a son could not acquire any property of his own during the life of his father ; but all his acquisitions belonged to the father, or at least the profits of them, for his life.

The power of a parent by our English laws is much more moderate ; but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner ; for this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child under age, was also *directed* by our ancient law to be obtained : but now it is absolutely *necessary*, for without it the contract is void.⁷ And this also is another means, which the law has put into the parent's hands, in *order the better to [*453 discharge his duty ; first, of protecting his children from the snares of artful and designing persons ; and, next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages. A father has no other power over his son's *estate* than as his trustee or guardian ; for though he may receive the profits during the child's minority, yet he must account for them when he comes of age. He may indeed have the benefit of his children's labor while they live with him, and are maintained by him ;⁸ but this is no more than he is entitled

⁷ See *ante*, note 11, page 147.

⁸ But the father may "emancipate" his minor child, as it is termed, *i. e.*, resign or renounce his claim to the child's services and earnings, and allow him to labor on his own account. The father will not, in such case, be bound to support the child, and the child will be entitled to his own earnings. (*Stanley v. Nat. Union Bk.*, 115 N. Y. 122 ; *Atwood v. Holcomb*, 39 Ct. 270.)

It is on the ground that a father is entitled to the services of his minor child, that he is permitted to maintain an action against any one who injures the child by any wrongful act, or entices him away, and thus deprives the father of his services and earnings. (*Cuming v. Brooklyn R. Co.*, 109 N. Y. 95 ; *Sargent v. Mathewson*, 38 N. H. 54.) In case of personal injury to the child, the action of the parent for loss of service is additional to one that may be brought on the child's behalf for the direct injury itself.

It is on the same ground that a father may sue for seduction of his daughter. The daughter cannot bring action herself on account of her consent to the wrongful act, and the father, therefore, sues for the consequential injury which he has sustained by loss of service. If the daughter is a minor, it is held in this country, that the father may recover against her

to from his apprentices or servants. The legal power of a father—for a mother, as such, is entitled to no power, but only to reverence and respect; the power of a father, I say, over the persons of his children ceases at the age of twenty-one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established, as some must necessarily be established, when the empire of the father, or other guardian, gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children.† He may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.*, that of restraint and correction, as may be necessary to answer the purposes for which he is employed.⁹

3. The *duties* of children to their parents arise from a principle of natural justice and retribution.¹⁰ For to those who gave

† See *post*, page 178.

seducer, whether she be living in his own family or be in the service of another, since in the latter case he has the right to demand her services at any time. In one case the service is *actual*, in the other *constructive*. (*Lavery v. Crooke*, 52 Wis. 612; *Mulvehall v. Millward*, 11 N. Y. 343.) In England, however, if the daughter, though a minor, be in the service of another when seduced, the father has no right of action, since this doctrine of constructive service in such cases is not there maintained. In both countries, however, the rule in regard to adult daughters is that they must be actually in the father's service to enable him to maintain this action: very slight acts of service, however, will be sufficient to establish this relation, as, *e. g.*, living in his household and performing trifling household duties. These actions may be brought, not only by a father, but also by any one standing *in loco parentis* to the daughter, as, for instance, a guardian, step-father, etc. If the father be deceased, the mother may bring the action. (*Gray v. Durland*, 51 N. Y. 424; *Furman v. Van Sise*, 56 N. Y. 435.) The damages recoverable in these cases of seduction are not limited to the value of the services lost, but may be exemplary, on account of the disgrace and dishonor brought on the family and the greatness of the wrong.

⁹ But if the punishment administered by father or teacher be cruel, immoderate and excessive, the act will be wrongful, and punishable both civilly and criminally. (*Commonwealth v. Randall*, 4 Gray, 38; *Sheehan v. Sturges*, 53 Ct. 481; *Patterson v. Nutter*, 78 Me. 509.)

¹⁰ There is no common-law obligation upon a child to support an indigent parent; it is created solely by statute. In a number of the States of the Union there are statutes, as in England, providing for the maintenance of poor relatives. (*Herendeen v. De Witt*, 49 Hun, 53; see 70 Ind. 239; 20 Q. B. D. 252.)

us existence we naturally owe subjection and obedience during minority, and honor and reverence ever after : they who protected the weakness of our infancy are entitled to our protection in the infirmity of their age ; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents which are enjoined by positive laws. And the Athenian laws carried *this principle into practice with a [*454 scrupulous kind of nicety : obliging all children to provide for their father when fallen into poverty ; with an exception to spurious children, to those whose chastity had been prostituted by consent of the father, and to those whom he had not put in any way of gaining a livelihood. The legislature, says Baron Montesquieu considered, that in the first case the father, being uncertain, had rendered the natural obligation precarious ; that in the second case he had sullied the life he had given, and done his children the greatest of injuries, in depriving them of their reputation ; and that, in the third case, he had rendered their life, so far as in him lay, an insupportable burthen, by furnishing them with no means of subsistence.

Our laws agree with those of Athens : with regard to the first only of these particulars, the case of spurious issue. In the other cases the law does not hold the tie of nature to be dissolved by any misbehavior of the parent ; and therefore a child is equally justifiable in defending the person or maintaining the cause or suit, of a bad parent, as a good one ; and is equally compellable, if of sufficient ability, to maintain and provide for a wicked and unnatural progenitor, as for one who has shown the greatest tenderness and parental piety.

II. We are next to consider the case of illegitimate children, or bastards ; with regard to whom let us inquire, 1. Who are bastards. 2. The legal duties of the parents to a bastard child. 3. The rights and incapacities attending such bastard children.

1. Who are bastards. A bastard, by our English laws, is one that is not only begotten, but born, out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry and herein they differ most materially from our law : which, though not so strict as to require that the child shall be *begotten*, *yet makes it an [*455

indispensable condition, to make it legitimate, that it shall be *born*, after lawful wedlock.¹¹ And the reason of our English law is surely much superior to that of the Roman, if we consider the principal end and design of establishing the contract of marriage, taken in a civil light, abstractedly from any religious view, which has nothing to do with the legitimacy or illegitimacy of the children. The main end and design of marriage, therefore, being to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong: this end is, undoubtedly, better answered by legitimating all issue born after wedlock, than by legitimating all issue of the same parties, even born before wedlock, so as wedlock afterwards ensues: 1. Because of the very great uncertainty there will generally be, in the proof that the issue was really begotten by the same man; whereas, by confining the proof to the birth, and not to the begetting, our law has rendered it perfectly certain what child is legitimate, and who is to take care of the child. 2. Because by the Roman law a child may be continued a bastard, or made legitimate, at the option of the father and mother, by a marriage *ex post facto*; thereby opening a door to many frauds and partialities, which by our law are prevented. 3. Because by those laws a man may remain a bastard till forty years of age, and then become legitimate, by the subsequent marriage of his parents; whereby the main end of marriage, the protection of infants, is totally frustrated. 4. Because this rule of the Roman law admits of no limitations as to the time or number of bastards so to be legitimated; but a dozen of them may, twenty years after their birth, by the subsequent marriage of their parents, be admitted to all the privileges of legitimate children. This is plainly a great discouragement to the matrimonial state; to which one main inducement is usually not only the desire of having *children*, but also the desire of procreating lawful *heirs*. Whereas our constitutions guard against this indecency, and at the same time give sufficient allowance to the frailties of human nature. For, if a child be begotten while the parents are single, and they will endeavor to make an early reparation *456] for the offense, by *marrying within a few months after,

¹¹ The doctrine of the civil law prevails in a number of the American States, as *e. g.* Vermont, Maryland, Kentucky, Indiana, etc.; while in others the common-law doctrine is established. (See 91 N. Y. 315; 85 Ind. 397; 58 Ia. 46; 40 Ch. D. 216.)

our law is so indulgent as not to bastardize the child, if it be born, though not begotten, in lawful wedlock ; for this is an incident that can happen but once, since all future children will be begotten, as well as born, within the rules of honor and civil society. Upon reasons like these we may suppose the peers to have acted at the parliament of Merton, when they refused to enact that children born before marriage should be esteemed legitimate.

From what has been said, it appears, that all children born before matrimony are bastards by our law : and so it is of all children born so long after the death of the husband, that, by the usual course of gestation, they could not be begotten by him. But, this being a matter of some uncertainty, the law is not exact as to a few days. And this gives occasion to a proceeding at common law, where a widow is suspected to feign herself with child, in order to produce a supposititious heir to the estate : an attempt which the rigor of the Gothic constitutions esteemed equivalent to the most atrocious theft, and therefore punished with death. In this case, with us, the heir presumptive may have a writ *de ventre inspiciendo* to examine whether she be with child, or not ; and, if she be, to keep her under proper restraint till delivered ; which is entirely conformable to the practice of the civil law : but, if the widow be, upon due examination, found not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again, on the birth of a child within forty weeks from the death of a husband. But, if a man dies, and his widow soon after marries again, and a child is born within such a time, as that by the course of nature it might have been the child of either husband ; in this case he is said to be more than ordinarily legitimate ; for he may, when he arrives to years of discretion, choose which of the fathers he pleases.¹² To prevent this, among other inconveniences, the civil law ordained that no widow should marry *infra annum luctus*, a rule which obtained so early as the reign of Augustus, if not of Romulus : and the same constitution was probably handed down to our early ancestors from the Romans, during their stay in this island ; for

¹² " But this doctrine, if ever recognized, was too absurd to last, and it was afterwards held to be a question for the jury to determine, according to the evidence, which husband was most likely to be the father." (Broom & Hadley's Comm., i. p. 561.)

we find it established under the Saxon and Danish governments.

As bastards may be born before the coverture or marriage state is begun, or after it is determined, so also children born during wedlock may in some circumstances be bastards. As if the husband be out of the kingdom of England, or, as the law somewhat loosely phrases it, *extra quatuor maria*, for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards.¹⁸ But, generally, during the coverture, access of the husband shall be presumed, unless the contrary can be shown, which is such a negative as can only be proved by showing him to be elsewhere : for the general rule is, *præsumitur pro legitimatione*. In a divorce, *a mensa et thoro*, if the wife breeds children, they are bastards ; for the law will presume the husband and wife conformable to the sentence of separation, unless access be proved ; but, in a voluntary separation, by agreement, the law will suppose access, unless the negative be shown. So also, if there is an apparent impossibility of procreation on the part of the husband, as if he be only eight years old, or the like, there the issue of the wife shall be bastards. Likewise, in case of divorce in the spiritual court, *a vinculo matrimonii*, all the issue born during the coverture are *458] bastards ; because such divorce is always upon *some cause, that rendered the marriage unlawful and null from the beginning.

2. Let us next see the duty of parents to their bastard children, by our law ; which is principally that of maintenance. For, though bastards are not looked upon as children to any

18 " But the old doctrine of the *quatuor maria* was long since exploded ; and the child will now be considered illegitimate if he be born under such circumstances as make it impossible that his mother's husband could have begotten him, whether this impossibility arise from non-access, physical infirmity, or other cause : but the presumption of legitimacy still holds to this extent, that if the husband have any opportunity of sexual access during the natural period of gestation, the child will be considered legitimate, though there may be the strongest reason for supposing it the offspring of an adulterer, — the question for the jury in such a case always being, not whether the husband be the father, but whether he could have been such." (Broom & Hadley's Comm. i. p. 562.) The same rule prevails in this country. (See *Phillips v. Allen*, 2 Allen, 453 ; *Van Aernam v. Van Aernam*, 1 Barb. Ch. 375 ; *Dennison v. Page*, 29 Penn. St. 420 ; *Watts v. Owen*, 62 Wis. 512.)

civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved: and they hold indeed as to many other intentions; as, particularly, that a man shall not marry his bastard sister or daughter. The civil law, therefore, when it denied maintenance to bastards begotten under certain atrocious circumstances, was neither consonant to nature nor reason, however profligate and wicked the parents might justly be esteemed.

The method in which the English law provides maintenance for them is as follows: When a woman is delivered, or declares herself with child, of a bastard, and will by oath before a justice of peace charge any person as having got her with child, the justice shall cause such person to be apprehended, and commit him till he gives security, either to maintain the child, or appear at the next quarter sessions to dispute and try the fact. But if the woman dies, or is married before delivery, or miscarries, or proves not to have been with child, the person shall be discharged; otherwise the sessions, or two justices out of sessions, upon original application to them, may take order for the keeping of the bastard, by charging the mother or the reputed father with the payment of money or other sustentation for that purpose. And if such putative father, or lewd mother, run away from the parish, the overseers, by direction of two justices, may seize their rents, goods, and chattels, in order to bring up the said bastard child. Yet such is the humanity of our laws, that no woman can be compulsively questioned concerning the father of her child till one month after her delivery; which indulgence is, however, very frequently a hardship upon parishes, by giving the parents opportunity to escape.¹⁴

3. I proceed next to the rights and incapacities which appertain to a bastard. The rights are very few, being only such as he can *acquire*; for he can *inherit* nothing, being looked upon as the son of nobody; and sometimes called *filius nullius*, some-

¹⁴ These acts have been superseded by later statutes, which, however, are adapted to secure substantially the same objects, viz., to make the putative father liable for the maintenance and education of his illegitimate child by means of a proceeding instituted before justices. The mother, however, is not released from her liability to support the child, if the father cannot be made responsible. The acts now regulating this subject are the 35 & 36 Vict., ch. 65; 36 Vict., ch. 9; 43 & 44 Vict., ch. 32. Statutes of a similar character have been enacted in a number of the United States. (See N. Y. Code Crim. Pro. §§ 838-886.)

times *filius populi*. Yet he may gain a surname by reputation, though he has none by inheritance. All other children have their primary settlement in their father's parish; but a bastard in the parish where born, for he hath no father.¹⁵ However, in case of fraud, as if a woman be sent either by order of justices, or comes to beg as a vagrant, to a parish where she does not belong and drops her bastard there, the bastard shall, in the first case, be settled in the parish from whence she was illegally removed; or, in the latter case, in the mother's own parish, if the mother be apprehended for her vagrancy. Bastards also born in any licensed hospital for pregnant women, are settled in the parishes to which the mothers belong. The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for, being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived.¹⁶ A bastard was also, in strictness, incapable of holy orders; and, though that were dispensed with, yet he was utterly disqualified from holding any dignity in the church: but this doctrine seems now obsolete; and, in all other respects, there is no distinction between a bastard and another man. And really any other distinction, but that of not inheriting, which civil policy renders necessary, would, with regard to the innocent offspring of his parents' crimes, be odious, unjust, and cruel to the last degree: and yet the civil law, so boasted of for its equitable decisions, made bastards, in some cases, incapable even of a gift from their parents. A bastard may, lastly, be made legitimate, and capable of inheriting, by the transcendent power of an act of parliament, and not otherwise: as was done in the case of John of Gaunt's bastard children, by a statute of Richard the Second.

¹⁵ But now in England, a bastard's settlement depends upon that of the mother until he acquires one of his own. In this country, also, it is frequently made to depend upon the mother's settlement. It is a general rule that the mother is entitled to the legal custody of her illegitimate child in preference to the putative father. (See *People v. Kling*, 6 Barb. 366; *Pote's Appeal*, 106 Pa. St. 574.)

¹⁶ In a number of the United States statutes have been enacted, providing that an illegitimate child may, in default of lawful issue, inherit real and personal property from the mother; and that the mother, or relatives on the mother's side, if such child dies intestate without descendants, shall in like manner inherit from him. Such is the rule in New York. (N. Y. Rev. St. i. 753, Laws of 1855, c. 547; see *Elder v. Bales*, 127 Ill. 425.)

CHAPTER VII.

[BL. COMM.—BOOK I. CH. XVII.]

Of Guardian and Ward.

THE only general private relation, now remaining to be discussed, is that of guardian and ward; which bears a very near resemblance to the last, and is plainly derived out of it: the guardian being only a temporary parent, that is, for so long time as the ward is an infant, or under age. In examining this species of relationship, I shall first consider the different kinds of guardians, how they are appointed, and their power and duty: next, the different ages of persons, as defined by the law: and lastly, the privileges and disabilities of an infant, or one under age and subject to guardianship.

1. The guardian with us performs the office both of the *tutor* and *curator* of the Roman laws; the former of which had the charge of the maintenance and education of the minor, the latter the care of his fortune; or, according to the language of the court of chancery, the *tutor* was the committee of the person, the *curator* the committee of the estate. But this office was frequently united in the civil law; as it is always in our law with regard to minors, though as to lunatics and idiots it is commonly kept distinct.

*Of the several species of guardians, the first are guardians *by nature*: viz. the father, and, in some cases, the mother of the child. For if an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profits. And, with regard to daughters, it seems by construction of the statute 4 and 5 Ph. and Mar. c. 8, that the father might by deed or will assign a guardian to any woman-child under the age of sixteen; and, if none be so assigned, the mother shall in this case be guardian. There are also guardians *for nurture*; which are, of course, the father or mother, till the infant attains the age of fourteen years: and in default of father or mother, the ordinary usually assigns some discreet person to

take care of the infant's personal estate, and to provide for his maintenance and education. Next are guardians *in socage*, (an appellation which will be fully explained in the second book of these Commentaries,) who are also called guardians *by the common law*.¹ These take place only when the minor is entitled to

¹ These several varieties of guardianship, viz., by nature, by nurture, and in socage, are still recognized in English and American law, though the relation of guardian and ward is now so frequently created in other methods that they have lost much of their former importance. In this country, moreover, the changes which have been wrought in the laws of inheritance have had an important effect upon these forms of guardianship. A *guardian by nature*, by the English law, had charge of the person, but not of the property, of the heir-apparent, until he reached the age of 21. An heir-apparent is one who, if he survives, has an indefeasible right to inherit from his ancestor; as, in England, the eldest son. This guardianship did not extend to the other children, and was vested in the father, or, in case of his death, in the mother. Under the laws of inheritance in the United States, by which all the children inherit equally, this guardianship extends to all the children, and is in fact substantially equivalent to the relation of *parent and child*, and has the usual legal consequences considered in law under that topic. A *guardian by nurture* also had charge only of the child's person, but his right continued only until the child became 14. This guardianship applied to all the children except the heir-apparent, and was vested, first, in the father, secondly, in the mother. In this country, where there is no distinction between an heir-apparent and the other children, it is evidently the same as guardianship by nature. A *guardian in socage*, had the custody of the infant's lands as well as his person, but only of lands obtained by descent. If the infant also had personal property, the guardian might take charge of that also. This guardianship devolved upon the next of kin, who could not possibly inherit the estate. It continued until the infant became 14, and would then cease if the infant chose another guardian, as he might do; but if this was not done, it continued still longer. In some of the United States, this kind of guardianship still exists, though the rule that the guardian must be incapable of inheriting the estate, has been generally changed. Thus, in New York, if an infant acquires lands, the guardianship belongs (1) to the father, (2) to the mother, (3) to the nearest and eldest relative of full age, males being preferred to females. But the authority of such a guardian is superseded by the appointment of a testamentary or other guardian. (Rev. St. i. 718; 105 N. Y. 560.) There may be also, by the common law, a *guardian by estoppel*. Thus, when one wrongly meddles with an infant's property, as by receiving the rents and profits, he may be called to account as a guardian, and will be *estopped* to deny that he has acted in that capacity.

These kinds of guardianship, heretofore considered, are such as exist *by operation of law*, without any appointment being necessary. But guardians are more frequently appointed by some court, or by the infant's parents. Guardians

some estate in lands, and then by the common law the guardianship devolves upon his next of kin, to whom the inheritance can not possibly descend; as, where the estate descended from his father, in this case his uncle by the mother's side cannot possibly inherit this estate, and therefore shall be the guardian. For the law judges it improper to trust the person of an infant in his hands, who may by possibility become heir to him; that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust. The Roman laws proceed on a quite contrary principle, committing the care of the minor to him who is the next to succeed to the inheritance, presuming that the next heir would take the best care of an estate, to which he has a prospect of succeeding; and this they boast to be "*summa providentia*." But in the mean time they seem to have forgotten, how much it is the *guardian's interest to remove the incumbrance of his [*462 pupil's life from that estate for which he is supposed to have so great a regard. And this affords Fortescue, and Sir Edward

appointed by courts, are either, (1) *guardians in chancery*, (2) *guardians ad litem*, (3) *guardians appointed by probate or surrogate courts*: those appointed by parents are *testamentary guardians*. In the first two forms of guardianship, the appointment is made by virtue of an inherent power in the court; in the last two, the power to appoint is conferred by statute. (1) In England, the court of chancery has, from an early period, exercised the power of appointing guardians to take the custody of minors and their estates. In the United States, courts of equity are generally invested with the same authority, their power in this respect being frequently prescribed by statute. If the infant be over 14 at the time of appointment, he is usually allowed by the court to choose a guardian for himself; but, if under 14, the court makes its own choice, with due regard, of course, to the wishes of relatives. The guardian's authority ceases when the ward becomes 21. (2) A guardian *ad litem* (i.e., for the litigation) may be appointed by any court in which an action is pending, to which the infant is a party. This is usually an attorney-at-law. The duty of such a guardian is to represent the infant in the suit and attend to its interests. (3) It is quite common to confer power by statute, upon probate and surrogate courts, to appoint guardians. The infant, if over 14, may usually choose the guardian, but not if under 14. Such guardians are primarily under the control of the probate court, but the court of chancery also has jurisdiction over them. (4) Testamentary guardians are those appointed by the father's will. The statute 12 Charles II., which first gave this power in England, has been generally adopted in this country, or statutes of similar purport have been enacted. Such guardians are also under the control of courts of equity. Their power generally lasts during the ward's minority, and extends both to his person and property. All guardians having charge of an infant's estate are generally required to give bonds for the faithful performance of their duties.

Coke, an ample opportunity for triumph; they affirming, that to commit the custody of an infant to him that is next in succession is "*quasi agnum committere lupo, ad devorandum.*" These guardians in socage, like those for nurture, continue only till the minor is fourteen years of age; for then, in both cases, he is presumed to have discretion, so far as to choose his own guardian. This he may do, unless one be appointed by the father, by virtue of the statute 12 Car. II., c. 24, which, considering the imbecility of judgment in children of the age of fourteen, and the abolition of guardianship *in chivalry* (which lasted till the age of twenty-one, and of which we shall speak hereafter), enacts, that any father, under age or of full age, may by deed or will dispose of the custody of his child, either born or unborn, to any person, except a popish recusant, either in possession or reversion, till such child attains the age of one-and-twenty years.² These are called guardians *by statute, or testamentary* guardians. There are also special guardians *by custom* of London, and other places; but they are particular exceptions, and do not fall under the general law.

The power and reciprocal duty of a guardian and ward are the same, *pro tempore*, as that of a father and child; and therefore I shall not repeat them, but shall only add, that the guardian, *463] when the ward comes of age, is bound to give *him an account of all that he has transacted on his behalf, and must answer for all losses by his wilful default or negligence.³ In order

² All religious disabilities are now removed.

³ The authority of the guardian over the ward's person is not, in all respects, identical with that which a father possesses, nor are his rights and obligations strictly the same, though this is true to a large extent. The guardian is under no obligation to support the child, except from the child's own property, nor has he any right to the ward's labor and services. But if the parents are dead or incompetent, he has, in general, a right to the custody of the ward and may direct his education. (*Gott v. Culp*, 45 Mich. 265.) And if the parents are dead, he may change the ward's domicile within the same State. (*Lamar v. Micon*, 112 U. S. 452.) The guardian usually has the same power as a father to bind out the child as an apprentice, but this matter is commonly governed by statutes. Guardianship of the *person* ends when the ward marries, and, according to the weight of authority, guardianship of the *property* also, if the ward is a female. The *guardian's* powers in reference to the *personal property* of the ward are quite ample. He may sell and dispose of such property, whether it consist of tangible property or of rights in action, and confer a good title upon the purchaser, unless such power is limited by statute or otherwise. (7

therefore to prevent disagreeable contests with young gentlemen, it has become a practice for many guardians, of large estates especially, to indemnify themselves by applying to the court of

Johns. Ch. 150.) But he cannot, in general, convert personalty into realty or *vice versa* without leave of court. Whatever personal property the ward becomes entitled to, as, *e. g.*, a bequest in a will, or a distributive share of an intestate's estate, etc., passes into the guardian's control. But as regards the ward's *real estate*, his authority is more limited. His chief right is to receive the rents and profits, and to place the land upon lease during the ward's minority. (*Stoughton's Appeal*, 88 Pa. St. 198; *Genet v. Talmadge*, 1 Johns. Ch. 561.) He is not permitted to erect buildings upon the ward's land, and hold the ward responsible for the expense incurred, unless he obtain authority from the proper court. (*Hassard v. Roe*, 11 Barb. 22.) The power to order a sale of the infant's real estate generally belongs to the court of chancery; and the method in which such sales are to be conducted is usually regulated by statute, and by rules of court thereby authorized. Power to make such sales is wont to be allowed, when it is deemed advantageous for the infant's interests, but a careful investigation is usually required to be made as to the nature and amount of the ward's property, and the reasons for disposing of it, before such authority will be granted. (See *Elwood v. Northrup*, 106 N. Y. 172; *Strong v. Moe*, 8 Allen, 125; see 44 & 45 Vict. c. 41, ss. 41-44.)

The *duties* of a guardian are to so keep charge of the ward's person and education, and to manage and attend to his property, that the interests of the ward will be best promoted. For his position is really that of a trustee, and, as in all cases of trust, he must consult solely the ward's advantage and not his own. Hence he cannot derive any personal gain from the use of the ward's money; and whatever profit is derived from an investment of such money belongs to the ward only. So if any profit is gained from any contract into which he enters on the infant's behalf, the infant is entitled to it. The mode in which investments of the ward's property shall be made is frequently prescribed by statute or rules of court (*Lamar v. Micou*, 112 U. S. 452); and if the guardian suffers the property to remain in an unproductive condition for an unreasonable length of time, he will be liable for simple interest thereon. If he is guilty of flagrant violation of duty or gross delinquency, as if he wilfully wastes the ward's money, or commits fraud, he may be compelled to pay compound interest. (56 Mich. 508.) So if he purposely injures the ward's real property or personal chattels, as by damaging a house, etc., he may be held liable in heavy damages. In cases of improper conduct, he may be removed by the court, and another guardian appointed in his stead. (*Ex parte Cooper*, 2 Paige, 34.) Fixed habits of intemperance have been held a sufficient ground of removal. (*Kettletas v. Gardner*, 1 Paige, 488.) Guardians may be required to give an account of their dealings with the ward's property from time to time; and in case of their removal, or the arrival of the ward at majority, it is a matter of course to require such an accounting and for the guardian to pay over the balance in his hands. (*Skidmore v. Davies*, 10 Paige, 316.) Upon an accounting, the guardian is charged with the assets of the estate, with profits and income which he did obtain or should have obtained, etc., while he is allowed for proper expenditures, unavoidable losses, etc. The

chancery, acting under its direction, and accounting annually before the officers of that court. For the lord chancellor is, by right derived from the crown, the general and supreme guardian of all infants, as well as idiots and lunatics; that is, of all such persons as have not discretion enough to manage their own concerns. In case therefore any guardian abuses his trust, the court will check and punish him; nay, sometimes will proceed to the removal of him, and appoint another in his stead.

2. Let us next consider the ward or person within age, for whose assistance and support these guardians are constituted by law; or who it is, that is said to be within age. The ages of male and female are different for different purposes. A male at *twelve* years old may take the oath of allegiance; at *fourteen* is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate;* at *seventeen* may be an executor; and at *twenty-one* is at his own disposal, and may alien his lands, goods and chattels. A female also at *seven* years of age may be betrothed or given in marriage; at *nine* is entitled to dower; at *twelve* is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion may bequeath her personal estate; at *fourteen* is at years of legal discretion, and may choose a guardian; at *seventeen* may be executrix; and at *twenty-one* may dispose of herself and her lands. So that full age in male

compensation of the guardian is generally regulated by statute, and is commonly a certain percentage upon moneys received and paid out. Transactions between the guardian and ward are carefully scrutinized by courts of equity, in order that no advantage may be taken of the ward; and even after the ward attains majority, contracts between him and the guardian will not be deemed valid, unless sufficient time has elapsed to render it reasonably presumable that the guardian's authority is no longer so influential with the child as to govern or bias his actions. (*Wade v. Pulsifer*, 54 Vt. 45.)

*As to the capacity of infants to make a valid will, see *post*, p. 596, note 2; as to their capacity to marry, see *ante*, p. 146, note 9. An infant may be named as executor in a will, or may be primarily entitled by law to be appointed administrator, but it is now the rule in England and generally in this country, that he cannot act as such until he becomes twenty-one. During his minority, therefore, administration will be granted to some other person, as, *e. g.*, his guardian. (See *post*, p. 602.) It is a general rule that infants attain majority at twenty-one; but in some American States female infants become of age at eighteen, as, *e. g.*, Vermont, Ohio, Iowa, etc. Blackstone's rule as to the betrothal or the dower right of female infants has no modern examples.

or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth, who till that time is an infant, and so styled in law. Among the ancient Greeks and Romans *women* were never *of age, but subject to perpetual guardianship, unless when married, "*nisi convenissent in manum viri*:" and, when that perpetual tutelage wore away in process of time, we find that, in females as well as males, full age was not till twenty-five years. Thus, by the constitution of different kingdoms, this period, which is merely arbitrary, and *juris positivi*, is fixed at different times. Scotland agrees with England in this point; both probably copying from the old Saxon constitutions⁵ on the continent, which extended the age of minority "*ad annum vigesimum primum, et eo usque juvenes sub tutelam reponunt*;" but in Naples they are of full age at *eighteen*; in France, with regard to marriage, not till *thirty*; and in Holland at *twenty-five*.

3. Infants have various privileges, and various disabilities; but their very disabilities are privileges; in order to secure them from hurting themselves by their own improvident acts. An infant cannot be sued but under the protection, and joining the name, of his guardian; for he is to defend him against all attacks as well by law as otherwise:⁶ but he may sue either by his guardian, or *prochein amy*, his next friend, who is not his guardian. This *prochein amy* may be any person who will undertake the infant's cause; and it frequently happens, that an infant, by his *prochein amy*, institutes a suit in equity against a fraudulent guardian. In criminal cases, an infant of the age of *fourteen* years may be capitally punished for any capital offence: but under the age of *seven* he cannot. The period between *seven* and *fourteen* is subject to much uncertainty: for the infant shall, generally speaking, be judged *prima facie* innocent; yet if he was *doli capax*, and could discern between good and evil at the time of the offence committed, he may be convicted and undergo judgment and execution of death, though he hath not attained to years of puberty or *discretion. And Sir Matthew Hale [*465

⁵ An infant sues or is sued in his own name as any other person, but appears to maintain or defend his cause by guardian, it being within the authority of every court to appoint a guardian *ad litem*, where one of the parties is an infant.

In some of the United States, as in New York, an infant does not appear by "next friend," but only by guardian *ad litem* duly appointed.

gives us two instances, one of a girl of thirteen, who was burned for killing her mistress ; another of a boy still younger, that had killed his companion, and hid himself, who was hanged ; for it appeared by his hiding that he knew he had done wrong, and could discern between good and evil : and in such cases the maxim of law is, that *malitia supplet ætatem*. So also, in much more modern times, a boy of ten years old, who was guilty of a heinous murder, was held a proper subject for capital punishment, by the opinion of all the judges.

With regard to estates and civil property, an infant hath many privileges, which will be better understood when we come to treat more particularly of those matters : but this may be said in general, that an infant shall lose nothing by non-claim, or neglect of demanding his right ; nor shall any other *laches* or negligence be imputed to an infant, except in some very particular cases.

It is generally true, that an infant can neither alien his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract, that will bind him. But still to all these rules there are some exceptions : part of which were just now mentioned in reckoning up the different capacities which they assume at different ages : and there are others, a few of which it may not be improper to recite, as a general specimen of the whole. And, first, it is true, that infants cannot alien their estates : but infant trustees, or mortgagees, are enabled to convey, under the direction of the court of chancery or exchequer, or other courts of equity, the estates they hold in trust or mortgage, to such person as the court shall appoint. Also it is generally true, that an infant can do no legal act : yet an infant, who has had an advowson, may present to the benefice when it becomes void. For the law in this case dispenses with one rule, in order *466] to maintain others of far *greater consequence : it permits an infant to present a clerk, who, if unfit, may be rejected by the bishop, rather than either suffer the church to be unserved till he comes of age, or permit the infant to be debarred of his right by lapse to the bishop. An infant may also purchase lands, but his purchase is incomplete : for, when he comes to age, he may either agree or disagree to it, as he thinks prudent or proper, without alleging any reason ; and so may his heirs after him, if he dies without having compelled his agreement. It is, farther

generally true, that an infant, under twenty-one, can make no deed but what is afterwards voidable : yet in some cases he may bind himself apprentice by deed indented or indentures, for seven years ; and he may by deed or will appoint a guardian to his children, if he has any. Lastly, it is generally true, that an infant can make no other contract that will bind him : yet he may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessities ; and likewise for his good teaching and instruction whereby he may profit himself afterwards. And thus much, at present, for the privileges and disabilities of infants.⁶

⁶ *I. An Infant's Liability upon Contract.*—It has been provided in England by statute, passed Aug. 7, 1874, that all contracts which before by law were voidable, whether by specialty or by simple contract, entered into by infants for the repayment of money lent, or for goods supplied (other than contracts for necessities) and all accounts stated with infants shall be *absolutely void* ; and no action shall be brought upon any ratification made after full age of such contracts, whether such ratification be based upon a new consideration or not. (37 & 38 Vict., ch. 62.)

This statute sets at rest in England a question about which there has been from early times no little controversy, viz., whether an infant's contracts are void or voidable. Formerly the tendency was to hold agreements to be void which were not plainly for the infant's benefit, while in modern times the opposite view has been taken, and an infant's contracts generally declared voidable. Such had come to be the rule in England before this statute, and such still continues to be the rule in the United States. The distinction is of much importance, because if the contract be voidable only, it will be at the option of the infant to ratify or disaffirm it on coming of age, while if it be void, it is incapable of ratification. If an infant make a conveyance of his lands, he may disaffirm upon attaining majority, and bring an action of ejectment to recover possession. (*Bool v. Mix*, 17 Wend. 119.) In the case of wild and vacant lands, a conveyance to another will be a sufficient disaffirmance. (*Wallace v. Carpenter*, 11 Johns. 539.) In some States, it is held that ejectment may be brought at any time within 20 years after coming of age, or within the usual period of limitation.* But some positive act of disaffirmance is necessary in order to avoid the conveyance. (*Voorhies v. Voorhies*, 24 Barb. 150 ; *Sims v. Bardoner*, 86 Ind. 87.) If an infant has purchased real estate, it will be deemed a ratification, if after becoming of age, he retains possession and exercises acts of ownership over the property. (*Henry v. Root*, 33 N. Y. 526.) Sales of personal property by infants may be avoided by them during minority, or within a reasonable time afterwards, by any proper act of disaffirmance, as by bringing suit to recover the property. (*Stafford v. Roof*, 9 Cow. 626 ; 73 Me. 252 ; 49 N. Y. 407.) An unconditional re-sale of the property is such an act. (*State v. Plaisted*, 43 N. H. 413.) If the infant had purchased personal

* See *Irvine v. Irvine*, 9 Wall. 617 ; *Sims v. Everhart*, 102 U. S. 300. Some States allow only a "reasonable time" after reaching majority. (31 Minn. 468.)

CHAPTER VIII.

[BL. COMM.—BOOK I. CH. XVIII.]

Of Corporations.

WE have hitherto considered persons in their natural capacities and have treated of their rights and duties. But, as all personal rights die with the person ; and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impracticable, a retention and use thereof after majority for an unreasonable length of time, would be an affirmance. (*Boyden v. Boyden*, 9 Metc. 519.) Bonds, promissory notes, and other executory contracts of an infant will not be enforceable unless he ratifies them on attaining majority. (96 N. Y. 201 ; see 114 Mass. 399.) But if the infant has acquired any property under the contract or derived any pecuniary benefit, he should, as a general rule, return this to the other party on rescinding the agreement, so as to restore him, as far as possible, to the same condition as before the contract was made.* (106 Ill. 519 ; 17 Barb. 428. For the special Mass. rule, see 97 Mass. 508.) If an infant makes a contract to serve for a certain time, he may leave the employment before the time has expired, and still be entitled to recover for the value of the services actually rendered. (3 Denio, 375 ; 110 Mass. 137.) The defense of infancy is personal to the infant himself and his representatives, and cannot be asserted by others. (96 N. Y. 201 ; 97 Mass. 508.)

There is one exception, of great importance, to the rule that an infant's contracts are voidable, and that is in regard to contracts for "*necessaries*," which are held binding. This exception is established for the infant's benefit, so that he may be able to procure the means of subsistence. Under the term "*necessaries*," would be included food, lodging, clothing, medicine, etc. Such articles would come within this category as were suitable to the infant's position and station in life ; so that what would be necessaries in one case, might not be so in another. Diversity in wealth and social station would cause an important difference in this respect. (*Atchison v. Bruff*, 50 Barb. 381 ; *Ryder v. Wombwell*, L. R. 4 Ex. 32 ; see 86 Ind. 373.) What classes of articles are comprehended in the term "*necessaries*," is for the court to determine upon, and to state as matter of law to the jury, while the jury decide as matter of fact, whether particular articles, in the special case under trial, come within any of these classes. But though an infant is liable for necessaries, he is not necessarily bound to pay the price agreed upon ; and the reasonableness of this may be inquired into by the court

* But if he cannot do this, he may still rescind. (*Green v. Green*, 69 N. Y. 553 ; *Chandler v. Simmons*, 97 Mass. 508 ; see 59 N. H. 354.)

ble; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.

These artificial persons are called bodies politic, bodies corporate, (*corpora corporata*), or corporations: of which there is a great variety subsisting, for the advancement of religion, of learn-

and, if excessive, it will be reduced to the real value of the goods. Moreover, if the infant's support is provided for by his father, guardian, or friends, he will not be responsible even for necessities: one who furnishes articles to him is bound to make due inquiry as to his need of them, and acts at his peril in relying upon the infant's responsibility. (13 Q. B. D. 410; 19 id. 509; 2 Paige, 419.) So if the goods be furnished upon the father's credit, the infant is relieved from accountability for the payment. (See 114 Mass. 397.)

II. Liability for Torts.—It is a general rule that an infant is responsible for his torts; as, for assault and battery, for conversion (*i. e.*, the wrongful appropriation of another's chattels), for negligence causing injury, etc. (*Bullock v. Babcock*, 3 Wend. 391; *Conklin v. Thompson*, 29 Barb. 218; *Freeman v. Boland*, 14 R. I. 39.) But, in some cases, a tort is connected with a contract, and an infant is then held irresponsible, whenever to hold him liable on the ground of tort would be virtually to render him responsible upon his contract obligations. His contracts cannot be enforced, either directly or indirectly, unless duly ratified. Thus, if an infant be guilty of fraud in making a contract, he cannot be sued upon the contract, nor in tort for the fraud. (See *Moore v. Eastman*, 1 Hun. (N. Y.) 578; *Lowell v. Daniels*, 2 Gray, 161; and see *Studwell v. Shapter*, 54 N. Y. 249.) But if goods were furnished to the infant, under the contract, and he should avail himself of his infancy to avoid payment, the vendor might reclaim the goods, as having never parted with his property in them. (*Badger v. Phinney*, 15 Mass. 359.) For fraud, however, not connected with contract, an infant will be liable. So, although a contract be entered into, if the tort connected with it be a wilful and distinct wrong, and in reality independent of the agreement, though made possible by it, the infant will be responsible on the ground of tort; as if, for example, an infant should hire a horse and treat it with such wilful violence and cruelty as to cause its death. (*Campbell v. Stakes*, 2 Wend. 137; *Barnard v. Haggis*, 14 C. B. N. S. 45; *Hall v. Corcoran*, 107 Mass. 251.) An infant who falsely represents himself to be of full age, and thus induces another to contract with him is not liable for the fraud. (*Nash v. Jewett*, 61 Vt. 501; *Conrad v. Lane*, 26 Minn. 389; *Contra, Rice v. Boyer*, 108 Ind. 472.) But courts of equity sometimes grant relief in such cases. (*Unity Bank Case*, 3 De Gex & Jones, 63.) A father is not liable for the torts of his minor child, unless the latter was acting as his servant or agent. (*Schaefer v. Osterbrink*, 67 Wis. 495; *Hagerty v. Powers*, 66 Cal. 368; *Baker v. Morris*, 33 Kan. 580.)

III. Liability for Crime.—The general rules, stated in the text, in regard to responsibility on this ground, still prevail. (See *post*, p. 863, note 1; *People v. Kendall*, 25 Wend. 399.)

ing, and of commerce ; in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. To show the advantages of these incorporations, let us consider the case of a college in either of our universities, founded *ad studendum et orandum*, for the encouragement and support of religion and learning. If this were a mere voluntary assembly, the individuals which compose it might indeed read, pray, study, and perform scholastic exercises together, so long as they could agree *468] to do so : but they *could neither frame, nor receive any laws or rules of their conduct ; none at least, which would have any binding force, for want of a coercive power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immunities : for, if such privileges be attacked, which of all this unconnected assembly has the right, or ability, to defend them ? And, when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students, equally unconnected as themselves ? So also, with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other, as often as the hands are changed. But when they are consolidated and united into a corporation, they and their successors are then considered as one person in law : as one person, they have one will, which is collected from the sense of the majority of the individuals : this one will may establish rules and orders for the regulation of the whole, which are a sort of municipal law of this little republic ; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws : the privileges and immunities, the estates and possessions, of the corporation, when once vested in them, will be for ever vested, without any new conveyance to new successions ; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies : in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.

The honor of originally inventing these political constitutions entirely belongs to the Romans. They were introduced, as Plutarch says, by Numa; who finding, upon his accession, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic measure to subdivide these two into many smaller ones, by *instituting separate societies [*469 of every manual trade and profession. They were afterwards much considered by the civil law, in which they were called *universitates*, as forming one whole out of many individuals; or *collegia*, from being gathered together: they were adopted also by the canon law, for the maintenance of ecclesiastical discipline; and from them our spiritual corporations are derived. But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation: particularly with regard to sole corporations, consisting of one person only, of which the Roman lawyers had no notion; their maxim being that "*tres faciunt collegium*." Though they held, that if a corporation, originally consisting of three persons, be reduced to one, "*si universitas ad unum redit*," it may still subsist as a corporation, "*et stet nomen universitatis*."

Before we proceed to treat of the several incidents of corporations, as regarded by the laws of England, let us first take a view of the several sorts of them; and then we shall be better enabled to apprehend their respective qualities.

The first division of corporations is into *aggregate* and *sole*. Corporations aggregate consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue forever: of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations sole consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had.¹ In this

¹ Sole corporations are very rare in the United States. But in Massachusetts, it has been held that a minister seized of parsonage lands, in the right of the parish, is, for this purpose, a sole corporation. (*Brunswick v. Dunning*, 7 Mass. 447.) So, in New York, where, by statute, a joint stock company may be sued in the name of its president (or treasurer), this officer is deemed a corporation sole, for the purpose of bringing actions. (*Westcott v. Fargo*, 61 N. Y. 542.)

sense, the king is a sole corporation ; so is a bishop ; so are some deans, and prebendaries, distinct from their several chapters ; and so is every parson and vicar. And the necessity, or at least use, of this institution will be very apparent, if we consider the *470] case of *a parson of a church. At the original endowment of parish churches, the freehold of the church, the church-yard, the parsonage house, the glebe, and the tithes of the parish, were vested in the then parson by the bounty of the donor, as a temporal recompense to him for his spiritual care of the inhabitants, and with intent that the same emoluments should ever afterwards continue as a recompense for the same care. But how was this to be effected ? The freehold was vested in the parson ; and, if we suppose it vested in his natural capacity, on his death it might descend to his heir, and would be liable to his debts and incumbrances : or, at best, the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law therefore has wisely ordained, that the parson, *quatenus* parson, shall never die, any more than the king ; by making him and his successors a corporation. By which means all the original rights of the parsonage are preserved entire to the successor : for the present incumbent, and his predecessor who lived seven centuries ago, are in law one and the same person ; and what was given to the one was given to the other also.

Another division of incorporations, either sole or aggregate, is into *ecclesiastical* and *lay*. Ecclesiastical corporations are where the members that compose it are entirely spiritual persons : such as, bishops ; certain deans, and prebendaries ; all archdeacons, parsons, and vicars ; which are sole corporations ; deans and chapters at present, and formerly prior and convent, abbot and monks, and the like, bodies aggregate. These are erected for the furtherance of religion, and perpetuating the rights of the church.² Lay corporations are of two sorts, *civil* and *elemosynary*. The civil are such as are erected for a variety of temporal purposes. The king, for instance, is made a corporation to prevent in general the possibility of an *interregnum* or vacancy of the throne, and to preserve the possessions of the crown en-

² Ecclesiastical corporations, in the strict legal meaning of the phrase, do not exist in the United States. Religious bodies and associations in this country are civil corporations. (*Robertson v. Bullions*, 11 N. Y. 243.)

tire ; for immediately upon the demise of one king, his successor is, as we have formerly seen, in full possession of the regal rights and dignity. Other lay corporations are erected for the good government of *a town or particular district, as a mayor [*471 and commonalty, bailiff and burgesses, or the like : some for the advancement and regulation of manufactures and commerce ; as the trading companies of London, and other towns : and some for the better carrying on of divers special purposes ; as church wardens, for conservation of the goods of the parish ; the college of physicians and company of surgeons in London, for the improvement of the medical science ; the royal society, for the advancement of natural knowledge ; and the society of antiquaries for promoting the study of antiquities. And among these I am inclined to think the general corporate bodies of the universities of Oxford and Cambridge must be ranked : for it is clear they are not spiritual or ecclesiastical corporations, being composed of more laymen than clergy : neither are they eleemosynary foundations, though stipends are annexed to particular magistrates and professors, any more than other corporations where the acting officers have standing salaries ; for these are rewards *pro opere et labore*, not charitable donations only, since every stipend is preceded by service and duty : they seem therefore to be merely civil corporations. The eleemosynary sort are such as are constituted for the perpetual distribution of the free alms, or bounty, of the founder of them to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick, and impotent : and all colleges both *in* our universities and *out* of them : which colleges are founded for two purposes ; 1. For the promotion of piety and learning by proper regulations and ordinances. 2. For imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity. And all these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons, and although they in some things partake of the nature, privileges, and restrictions of ecclesiastical bodies.⁸

⁸ There are also other important distinctions between corporations which deserve mention. Thus civil corporations are distinguished as *public* and *private*. Public corporations are such as are established for purposes of government, and invested with political powers, as cities and villages ; these

*472] *Having thus marshalled the several species of corporations, let us next proceed to consider, 1. How corporations in general may be created. 2. What are their powers, capacities, and incapacities. 3. How corporations are visited. And 4. How they may be dissolved.

I. Corporations, by the civil law, seem to have been created by the mere act, and voluntary association of their members; provided such convention was not contrary to law, for then it was *illicitum collegium*. It does not appear that the prince's consent was necessary to be actually given to the foundation of them; but merely that the original founders of these voluntary and friendly societies, for they were little more than such, should not establish any meetings in opposition to the laws of the state.

But, with us in England, the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given. The king's implied consent is to be found in corporations which exist by force of the *common law*, to which our former kings are supposed to have given their concurrence; common law being nothing else but custom, arising from the

are otherwise termed municipal corporations. Private corporations include others of a civil character. Though a corporation be created by public authority, and contribute largely to public advantage, yet it is private, unless empowered to administer civil or municipal authority. Thus a bank created by government for its own uses, but the stock of which is owned by private persons, is a private corporation. So are railroads, insurance companies, manufacturing associations, etc. This distinction is of much consequence in the United States, since a public corporation, being regarded as a mere instrument of government, and a depositary of political power conferred by the legislature, can be established or dissolved, invested with new powers or deprived of those which it previously possessed, at the will of the legislature. But an act creating a private corporation, on the other hand, is in the nature of a contract; and under that provision in the U. S. Constitution which prohibits the States from passing any law impairing the obligation of contracts, cannot be abrogated, or essentially altered or impaired, by the annexation of any new terms or conditions. To avoid the effect of this rule, it is sometimes provided by State Constitutions that charters of private corporations shall be subject to modification or repeal, or a clause to this effect is inserted in the charter itself. There are also what are known as *quasi-corporations*, which are bodies possessing some of the ordinary powers of corporations, but not all; as, *e. g.*, counties, school districts, overseers of the poor, etc. In New York, and a number of the States, towns are *quasi* corporations. Such corporations are only liable for neglect or violation of duty, so far as a remedy is given against them by statute.

universal agreement of the whole community. Of this sort are the king himself, all bishops, parsons, vicars, churchwardens, and some others ; who by common law have ever been held, as far as our books can show us, to have been corporations, *virtute officii* : and this incorporation is so inseparably annexed to their offices, that we cannot frame a complete legal idea of any of these persons, but we must also have an idea of a corporation, capable to transmit *his rights to his successor at the same time. [*473 Another method of implication, whereby the king's consent is presumed, is as to all corporations by *prescription*, such as the city of London, and many others which have existed as corporations, time whereof the memory of man runneth not to the contrary ; and therefore are looked upon in law to be well created. For though the members thereof can show no legal charter of incorporation, yet in cases of such high antiquity the law presumes there once was one ; and that by the variety of accidents which a length of time may produce, the charter is lost or destroyed. The methods by which the king's consent is expressly given are either by act of parliament or charter. By act of parliament, of which the royal assent is a necessary ingredient, corporations may undoubtedly be created : but it is observable, that, till of late years, most of these statutes which are usually cited as having created corporations do either confirm such as have been before created by the king, as in case of the College of Physicians, erected by charter 10, Henry VIII. which charter was afterwards confirmed in parliament ; or they permit the king to erect a corporation *in futuro* with such and such powers, as is the case of the Bank of England, and the society of the British Fishery. So that the immediate creative act was usually performed by the king alone, in virtue of his royal prerogative.

All the other methods, therefore, whereby corporations exist, by common law, by prescription, and by act of parliament, are for the most-part reducible to this of the king's letters patent, or charter of incorporation. The king's creation may be performed by the words "*creamus, erigimus, fundamus, incorporamus*," or the like. Nay, it is held, that if the king grants to a set of men to have *gildam mercatoriam*, a *mercantile meeting or assembly, [*474 this is alone sufficient to incorporate and establish them for ever.

The parliament, we observed, by its absolute and transcendent authority, may perform this, or any other act whatsoever :

and actually did perform it to a great extent, by statute 39 Eliz. c. 5, which incorporated all hospitals and houses of correction founded by charitable persons, without farther trouble: and the same has been done in other cases of charitable foundations. But otherwise it has not formerly been usual thus to intrench upon the prerogative of the crown, and the king may prevent it when he pleases. And, in the particular instance before mentioned, it was done, as Sir Edward Coke observes, to avoid the charges of incorporation and licenses of mortmain in small benefactions; which in his days were grown so great, that they discouraged many men from undertaking these pious and charitable works.

The king, it is said, may grant to a subject the power of erecting corporations, though the contrary was formerly held: that is, he may permit the subject to name the person and powers of the corporation at his pleasure; but it is really the king that erects, and the subject is but the instrument: for though none but the king can make a corporation, yet *qui facit per alium, facit per se*. In this manner the chancellor of the University of Oxford has power by charter to erect corporations; and has actually often exerted it, in the erection of several matriculated companies, now subsisting, of tradesmen subservient to the students.⁴

⁴ Corporations may exist in the United States by prescription, though this is seldom the case. (*Robie v. Sedgwick*, 35 Barb. 319.) The validity of a corporation is sometimes based upon this ground, when the regular mode of incorporation by legislative act is found to have been technically defective. The usual period of prescription is twenty years. (*Chittenden v. Chittenden*, 1 American Law Register, 538.) But corporations are, with but few exceptions, created in this country by legislative act. This may be either a *special act*, granting a charter to a particular association of individuals, endowing them with corporate powers for a particular purpose, or a *general law*, by which a general mode is pointed out, in which individuals may associate themselves together and obtain authority to act as a corporation, without special legislation for their particular benefit. Thus, if the legislature should enact that any body of persons, not less than a certain number, might form a banking association by signing articles of association filing a certificate of intent with a particular public officer, electing officers, etc., this would be a "general law;" and these are the main formalities usually prescribed in such cases. In some States, the evils of special legislation have been so seriously felt, that it has been provided in the State Constitutions, that all private corporations shall be formed under general laws wherever practicable. Thus, in New York, it is declared that private corporations shall not be created by special act, except in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained by general laws. Const. Art. 8, § 1.) The power to create a cor

When a corporation is erected, a name must be given to it ; and by that name alone it must sue, and be sued, and do all *legal acts ; though a very minute variation therein is not [*475 material. Such name is the very being of its constitution ; and, though it is the will of the king that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions. The name of incorporation, says Sir Edward Coke, is as a proper name, or name of baptism ; and therefore when a private founder gives his college or hospital a name, he does it only as a godfather, and by that same name the king baptizes the incorporation.

II. After a corporation is so formed and named, it acquires many powers, rights, capacities, and incapacities, which we are next to consider. Some of these are necessarily and inseparably incident to every corporation ; which incidents, as soon as a corporation is duly erected, are tacitly annexed, of course. As, 1. To have perpetual succession. This is the very end of its incorporation ; for there cannot be a succession forever without an incorporation ; and therefore all aggregate corporations have a power necessarily implied of electing members in the room of such as go off.⁵ 2. To sue or be sued, implead or be impleaded, poration, is also sometimes delegated to some particular association or body of men. In New York, for example, the Regents of the University may, in certain cases, incorporate colleges and academies.

It is essential to the formation of a corporation that its acceptance of the powers and privileges conferred should be signified. A body of men cannot be forced to become a corporation without their consent. Such consent may be indicated either directly or indirectly. Thus, a regular exercise of corporate powers, technically called "user," would be sufficient. (*Bangor, &c., R. R. v. Smith*, 47 Me. 34.)

There are a number of corporations still existing in this country, which were created by charter from the English Crown during the Colonial period. These charters are held to be as inviolable by the acts of the State legislatures as charters granted after the Union was formed and the several State organizations erected in their present form. (*Dartmouth College v. Woodward*, 4 Wheaton, 518.)

⁵ But a distinction must be taken, in regard to admission to membership, between stock corporations and those not having a capital stock divided into shares. Thus, in railroad, insurance, and manufacturing companies, and others of the same character, where there is a capital stock applied to purposes of profit, membership is constituted by a transfer of shares without any election on the part of the corporation itself. (*Overseers v. Sears*, 22 Pick. 122.) In other corporations, as, *e. g.*, colleges, library associations, etc., membership depends upon an actual election. The number of mem-

grant or receive, by its corporate name, and do all other acts as natural persons may.⁶ 3. To purchase lands, and hold them, for members may be limited by statute or the terms of the charter; and the time and manner of election are frequently prescribed in the same way, or determined by the by-laws of the corporation. The corporation at large may, if the charter does not forbid, delegate the power of electing members to a select body. When the powers of the corporation are exercised by a definite number of persons, as the directors or trustees, it is the general rule, unless specially provided otherwise, that a majority of this number is necessary to constitute a quorum, but that a majority of those assembled on any occasion, if a quorum be present, may do binding corporate acts, of which the election of members would be one. In like manner, corporations have power to elect officers, and to remove both officers and members for good cause. The removal of a member is termed technically, "disfranchisement," and of an officer, "amotion." The causes of disfranchisement are said to be three in number: (1) Violation of duty to the society, as a member of the corporation; (2) Offences as a *citizen* against the laws of the country; (3) Breach of duty, in respect alike to the corporation and the laws. (See 32 N.Y. 194.) But in joint-stock or moneyed corporations, a stockholder cannot be disfranchised, since his membership depends only on the ownership of shares.

⁶ This does not mean that a corporation may do all acts which natural persons may perform, but only such as are authorized by its charter or by statutory provisions, either expressly or by necessary implication. Corporations are formed for particular purposes, and cannot exercise other powers than those which are conferred by legislative authority. An insurance company, for instance, cannot act as a banking association. The general functions of a corporate body must be limited and determined by the nature and object of its institution. But whatever authority is necessary to carry into effect the powers specially granted is deemed to be conferred by implication. Thus, a corporation formed for purposes of trade may borrow money, give promissory notes in the course of its legitimate business, etc., unless there is some special restriction prohibiting such acts. (*Brookman v. Metcalf*, 32 N. Y. 591; *People v. Insurance Co.*, 15 John. 358.) Acts outside of the legitimate scope of a corporation's powers are said to be "*ultra vires*." It is now the generally received doctrine that such unauthorized acts and contracts are void (*Att'y Gen. v. G. E. R. Co.*, 5 App. Cas. 473; *Or. R. Co. v. Or. R. Co.*, 130 U. S. 1; *Thomas v. R. Co.*, 101 U. S. 71), though there are some important modifications of this rule. Thus, the plea of *ultra vires* will not protect a corporation from liability for the torts of its agents within the scope of their general powers. (*Nat. Bk. v. Graham*, 100 U. S. 699; *Booth v. Farmers' Bk.*, 50 N. Y. 396.) So when a contract *ultra vires* has been fully executed by one of the parties thereto, it may be held enforceable against the other party. For, in general, the plea of *ultra vires* will not prevail when it would defeat the ends of justice or work a legal wrong. (*Railroad Co. v. McCarthy*, 96 U. S. 258; *Rider Raft Co. v. Roach*, 97 N. Y. 378.) For any abuse of power, or the exercise of unauthorized functions, the charter of a corporation may be withdrawn by a proceeding instituted in behalf of the State.

the benefit of themselves and their successors ; which two are consequential to the former. 4. To have a common seal. For a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse : it therefore acts and speaks only by its common seal. For, though the particular members may express their private consent to any acts, by words, or signing their names, yet this does not bind the corporation : it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole.⁷ 5. To make by-laws or private statutes for the better *government of the corpora- [*476 tion ; which are binding upon themselves, unless contrary to the laws of the land, and then they are void.⁸ This is also included by law in the very act of incorporation : for as natural reason is given to the natural body for the governing it, so by-laws or statutes are a sort of political reason to govern the body politic. And this right of making by-laws for their own government, not contrary to the law of the land, was allowed by the law of the twelve tables at Rome. But no trading company is with us allowed to make by-laws which may affect the king's prerogative, or the common profit of the people, under penalty of 40*l.* unless they be approved by the chancellor, treasurer, and chief justices, or the judges of assize in their circuits ; and, even though they be so approved, still, if contrary to law, they are void. These five powers are inseparably incident to every corporation, at least to every corporation *aggregate* ; for two of them, though they may be practised, yet are very unnecessary to a corporation *sole*, *viz.*, to

⁷ The old common-law rule, that corporations could not make contracts except under the corporate seal, is now discarded. At present, corporations are placed in this respect on much the same footing as natural persons, and are obliged to use a seal where an individual would be required to do so, as, *e. g.*, in a deed of lands, but not in other cases. Agents may be appointed without an instrument under seal ; and corporations, like individuals, will be bound by the acts of lawfully authorized agents acting within the scope of their authority. So the unauthorized transactions of an agent may be subsequently ratified. (*Fleckner v. United States*, 8 Wheaton, 357 ; *Howe v. Keeler*, 27 Conn. 538.)

⁸ By-laws must not be in conflict with the charter of the company, nor with the provisions of any statute, and must be reasonable. Otherwise they are void. (*Cartan v. Benevolent Society*, 3 Daly, 20 ; *Kent v. Quicksilver Co.*, 78 N. Y. 159.) The by-laws of municipal corporations are usually termed ordinances. Charters of private corporations usually vest the power to make by-laws in a select body ; as, for instance, the directors or trustees.

have a corporate seal to testify his sole assent, and to make statutes for the regulation of his own conduct.

There are also certain privileges and disabilities that attend an aggregate corporation, and are not applicable to such as are sole; the reason of them ceasing, and of course the law. It must always appear by attorney, for it cannot appear in person, being, as Sir Edward Coke says, invisible, and existing only in intendment and consideration of law. It can neither maintain, or be made defendant to, an action of battery or such like personal injuries; for a corporation can neither beat, nor be beaten, in its body politic.⁹ A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities.¹⁰ *477] Neither is it capable of suffering a *traitor's or felon's punishment, for it is not liable to corporeal penalties, nor to attainder, forfeiture, or corruption of blood. It cannot be executor or administrator, or perform any personal duties; for it cannot take an oath for the due execution of the office. It cannot be seized of lands to the use of another; for such kind of confidence is foreign to the end of its institution.¹¹ Neither can it be committed to prison; for, its existence being ideal, no man can ap-

⁹ Corporations are now held responsible for torts committed by their servants or agents, in the same way as a natural person would be. Their liability is to be determined by the inquiry whether the agent's act is within the scope of his employment. Corporations, in their province of action through agents, may commit nearly every variety of tort. Thus they are liable for assault and battery, for malicious prosecution, for libel, for fraud and deceit, for negligence, etc. Actions against them on the latter ground are very frequent. (*Denver, &c., R. Co. v. Harris*, 122 U. S. 597; *Fishkill Sav. Bk. v. Nat. Bk.*, 80 N. Y. 162; *Reed v. Home Sav. Bk.*, 130 Mass. 443.)

¹⁰ There are some few cases, however, in which a corporation may be made criminally responsible. Thus, it may be indicted for the creation of a nuisance. Railroad and turnpike companies are indictable for permitting highways and bridges to be out of repair, so as to interfere with travel or render it dangerous. These are wrongful acts resulting from a violation of corporate duties. (*People v. Albany*, 11 Wend. 539; *Comm. v. Vermont, &c., R. Co.*, 4 Gray, 22.)

¹¹ Corporations may now be seized of land in trust for another, the only limitation being that the purpose for which the land is held must not be foreign to the objects of their institution. Courts of equity will enforce the execution of any lawful trust vested in a corporation. Many corporations hold property in trust for charitable purposes. Personal property may also be held in the same way. Loan and trust companies are not infrequently incorporated at the present day, which are formed for this express purpose.

prehend or arrest it. And therefore, also, it cannot be outlawed; for outlawry always supposes a precedent right of arresting, which has been defeated by the parties absconding, and that also a corporation cannot do: for which reasons the proceedings to compel a corporation to appear to any suit by attorney are always by distress on their lands and goods. Neither can a corporation be excommunicated: for it has no soul, as is gravely observed by Sir Edward Coke; and therefore also it is not liable to be summoned into the ecclesiastical courts upon any account; for those courts act only *pro salute animæ*, and their sentences can only be enforced by spiritual censures: a consideration which, carried to its full extent, would alone demonstrate the impropriety of these courts interfering in any temporal rights whatsoever.

There are also other incidents and powers which belong to some sort of corporations, and not to others. An aggregate corporation may take goods and chattels for the benefit of themselves and their successors, but a sole corporation cannot: for such movable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor, which the law is careful to avoid. In ecclesiastical and eleemosynary foundations, the king or the founder may give them rules, laws, statutes, and ordinances, which they are bound to observe: but corporations merely *lay*, constituted for civil [*478] purposes, are subject to no particular statutes; but to the common law, and to their own by-laws, not contrary to the laws of the realm. Aggregate corporations, also, that have by their constitutions a head, as a dean, warden, master, or the like, cannot do any acts during the vacancy of the headship, except only appointing another: neither are they then capable of receiving a grant: for such corporation is incomplete without a head. But there may be a corporation aggregate, constituted without a head: as the collegiate church of Southwell, in Nottinghamshire, which consists only of prebendaries; and the governors of the Charterhouse, London, who have no president or superior, but are all of equal authority. In aggregate corporations, also, the act of the major part is esteemed the act of the whole. By the civil law this major part must have consisted of two-thirds of the whole, else no act could be performed: which perhaps may be one reason why they required three at least to make a corporation. But with us *any* majority is sufficient to determine the act of the

whole body.¹² And whereas, notwithstanding the law stood thus, some founders of corporations had made statutes in derogation of the common law, making very frequently the unanimous assent of the society to be necessary to any corporate act, which King Henry VIII. found to be a great obstruction to his projected scheme of obtaining a surrender of the lands of ecclesiastical corporations, it was therefore enacted by statute 33 Hen. VIII. c. 27, that all private statutes shall be utterly void, whereby any grant or election, made by the head, with the concurrence of the major part of the body, is liable to be obstructed by any one or more, being the minority: but this statute extends not to any negative or necessary voice, given by the founder to the head of any such society. We before observed, that it was incident to every corporation to have a capacity to purchase lands for themselves and *successors: and this is regularly true at the common law. But they are excepted out of the statute of wills: so that no devise of lands to a corporation by will is good, except for charitable uses, by statute 43 Eliz. c. 4; which exception is again greatly narrowed by the statute 9 Geo. II. c. 36. And also by a great variety of statutes, their privilege even of purchasing from any living grantor is much abridged: so that now a corporation, either ecclesiastical or lay, must have a license from the king to purchase, before they can exert that capacity which is vested in them by the common law: nor is even this in all cases sufficient. These statutes are generally called the statutes of *mortmain*; all purchases made by corporate bodies being said to be purchases in *mortmain*, in *mortua manu*: for the reason of which appellation Sir Edward Coke offers many conjectures; but there is one which seems more probable than any that he has given us; viz., that these purchases being usually made by ecclesiastical bodies, the members of which (being professed) were reck-

¹² When corporate acts are to be done by a definite number of persons, as for instance, the trustees or directors, a majority of this whole number is necessary to constitute a quorum; and a majority present at an authorized meeting may perform valid corporate acts. But if the power to act is vested in an indefinite number, a majority of those present on any occasion may act, whether a majority of the whole body or not. (*Ex parte Willcocks*, 7 Cow. 402.) But these general rules may be varied by statutory or charter provisions. In stock corporations, the votes of each stockholder depend upon the number of shares he owns; so that if one person owned a majority of the shares, he could control the acts of the corporation.

oned dead persons in law, and therefore holden by them might with great propriety be said to be held *in mortua manu*.¹⁸

I shall defer the more particular exposition of these statutes of mortmain till the next book of these Commentaries, when we shall consider the nature and tenures of estates; and also the exposition of those disabling statutes of Queen Elizabeth, which restrain spiritual and eleemosynary corporations from aliening such lands as they are at present in legal possession of: only mentioning them in this place, for the sake of regularity, as statutable incapacities incident and relative to corporations.

The general *duties* of all bodies politic, considered in their corporate capacity, may, like those of natural persons, be *reduced to this single one, that of acting up to the end or [*480 design, whatever it be, for which they were created by their founder.

III. I proceed therefore next to inquire, how these corporations may be *visited*. For corporations being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil, or

¹⁸ There are no statutes of mortmain in this country, except in Pennsylvania; and corporations may acquire and hold land, as well as personal property, so far as may be consistent with the purposes of their institution, unless prohibited or restricted by statute or charter. The power to hold lands is generally conferred by the charter in special terms, and the value of property which may be thus acquired, limited to a fixed amount. Such a limitation will apply to the value of the land at the time of acquisition, and though an increase in its value may occur subsequently, so that the limit is exceeded, the property may still be retained. (*In re McGraw*, 111 N. Y. 66; see 4 Sandf. Ch. 633.) A corporation authorized to hold land may take a conveyance in fee simple, though by the terms of the charter the corporation is to continue but a limited time. (*People v. O'Brien*, 111 N. Y. 1; see 12 N. Y. 121.) Religious corporations are sometimes placed under restrictions in regard to the power to make a sale of their lands, and required to obtain permission from a court of chancery. The power to take lands by devise is not usually vested in corporations, except for charitable purposes. And the amount of property which a testator may thus give to charitable organizations is sometimes limited by special provisions. Thus, in New York no person having a husband, wife, child, or parent, may devise or bequeath to a charitable corporation more than one-half of his estate after the payment of his debts. (*Laws* 1860, c. 360.) The English laws of mortmain were consolidated in 1888. (51 & 52 Vict. c. 42.)

eleemosynary. With regard to all ecclesiastical corporations, the ordinary is their visitor, so constituted by the canon law, and from thence derived to us. The pope formerly, and now the king, as supreme ordinary, is the visitor of the archbishop or metropolitan ; the metropolitan has the charge and coercion of all his suffragan bishops ; and the bishops in their several dioceses are in ecclesiastical matters the visitors of all deans and chapters, of all parsons and vicars, and of all other spiritual corporations. With respect to all lay corporations, the founder, his heirs, or assigns, are the visitors, whether the foundation be civil or eleemosynary ; for in a lay incorporation the ordinary neither can nor ought to visit.

I know it is generally said, that civil corporations are subject to no visitation, but merely to the common law of the land ; and this shall be presently explained. But first, as I have laid it down as a rule that the founder, his heirs, or assigns, are the visitors of all lay corporations, let us inquire what is meant by the *founder*. The founder of all corporations, in the strictest and original sense, is the king alone, for he only can incorporate a society ; and in civil incorporations, such as mayor or commonalty, &c., where there are no possessions or endowments given to the body, there is no other founder but the king : but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes, and makes *481] two species of *foundation ; the one *fundatio incipiens*, or the incorporation, in which sense the king is the general founder of all colleges and hospitals ; the other *fundatio perficiens*, or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is in law the founder : and it is in this last sense that we generally call a man the founder of a college or hospital. But here the king has his prerogative : for, if the king and a private man join in endowing an eleemosynary foundation, the king alone shall be the founder of it. And in general, the king being the sole founder of all civil corporations, and the endower the perficient founder of all eleemosynary ones, the right of visitation of the former results, according to the rule laid down, to the king ; and of the latter to the patron or endower.

The king being thus constituted by law visitor of all civil corporations, the law has also appointed the place wherein he shall exercise this jurisdiction : which is the court of king's bench ;

where, and where only, all misbehaviors of this kind of corporations are inquired into and redressed, and all their controversies decided. And this is what I understand to be the meaning of our lawyers when they say that these civil corporations are liable to no visitation : that is, that the law having by immemorial usage appointed them to be visited and inspected by the king, their founder, in his majesty's court of king's bench, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority. And this is so strictly true that though the king by his letters patent had subjected the College of physicians to the visitation of four very respectable persons, the lord chancellor, the two chief justices, and the chief baron ; though the college had accepted this charter with all possible marks of acquiescence, and had acted under it for near a century ; yet in 1753, the authority of this provision coming in dispute, on an appeal preferred to these supposed *visitors, they directed [*482 the legality of their own appointment to be argued ; and, as this college was merely a civil and not an eleemosynary foundation, they at length determined, upon several days' solemn debate, that they had no jurisdiction as visitors ; and remitted the appellant, if aggrieved, to his regular remedy in his majesty's court of king's bench.

As to eleemosynary corporations, by the dotation the founder and his heirs are of common right the legal visitors, to see that such property is rightly employed, as might otherwise have descended to the visitor himself : but, if the founder has appointed and assigned any other person to be visitor, then his assignee so appointed is invested with all the founder's power, in exclusion of his heir. Eleemosynary corporations are chiefly hospitals, or colleges in the universities. These were all of them considered, by the popish clergy, as of mere ecclesiastical jurisdiction : now, however, the law of the land judged otherwise ; and, with regard to hospitals, it has long been held, that if the hospital be spiritual, the bishop shall visit ; but if lay, the patron. This right of lay patrons was indeed abridged by statute 2 Hen. V. c. 1, which ordained, that the ordinary should visit *all* hospitals founded by subjects ; though the king's right was reserved to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by statute 14 Eliz. c. 5, which directs the bishop to visit such hospitals only where no visitor is

appointed by the founders thereof: and all the hospitals founded by virtue of the statute 39 Eliz. c. 5, are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the bishop of the diocese must visit.

Colleges in the universities (whatever the common law may now, or might formerly, judge) were certainly considered by the popish clergy, under whose direction they were, as *ecclesiastical*, or at least as *clerical*, corporations; and therefore the right of *483] visitation, was claimed by the ordinary of the *diocese. This is evident, because in many of our most ancient colleges, where the founder had a mind to subject them to a visitor of his own nomination, he obtained for that purpose a papal bull to exempt them from the jurisdiction of the ordinary; several of which are still preserved in the archives of the respective societies. And in some of our colleges, where no special visitor is appointed, the bishop of that diocese, in which Oxford was formerly comprised, has immemorially exercised visitorial authority; which can be ascribed to nothing else but his supposed title as ordinary to visit this, among other ecclesiastical foundations. And it is not impossible that the number of colleges in Cambridge, which are visited by the Bishop of Ely, may in part be derived from the same original.

But, whatever might be formerly the opinion of the clergy, it is now held as established common law, that colleges are lay corporations, though sometimes totally composed of ecclesiastical persons; and that the right of visitation does not arise from any principles of the canon law, but of necessity was created by the common law. And yet the power and jurisdiction of visitors in colleges was left so much in the dark at common law, that the whole doctrine was very unsettled till the famous case of *Philips and Bury*.(a) In this the main question was, whether the sentence of the Bishop of Exeter, who, as visitor, had deprived Doctor Bury, the rector of Exeter College, could be examined and redressed by the court of king's bench. And the three puisne judges were of opinion that it might be reviewed, for that the visitor's jurisdiction could not exclude the common law; and accordingly judgment was given in that court. But the Lord Chief Justice Holt was of a contrary opinion; and held

(a) Lord Raymond, 5; Salkeld's R. 403.

that, by the common law the office of visitor is to judge according to the statutes of the college, and to expel and deprive upon just occasions, and to hear all appeals of course; and that from him, and him only, the party grieved ought to have redress; the founder having reposed in him so entire a confidence, that he *will administer justice impartially, that his determina- [*484 tions are final, and examinable in no other court whatsoever. And upon this, a writ of error being brought into the House of Lords, they concurred in Sir John Holt's opinion, and reversed the judgment of the court of king's bench. To which leading case all subsequent determinations have been conformable. But, where the visitor is under a temporary disability, there the court of king's bench will interpose to prevent a defect of justice. Also it is said, that if a founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules and statutes, if the visitor in his sentence exceeds those rules, an action lies against him; but it is otherwise where he mistakes in a thing within his power.¹⁴

IV. We come now, in the last place, to consider how corporations may be dissolved. Any particular member may be disfranchised, or lose his place in the corporation, by acting contrary to the laws of the society, or the laws of the land; or he may resign it by his own voluntary act. But the body politic

¹⁴ The power of "visitation," strictly speaking, appertains only to ecclesiastical and eleemosynary corporations. In the United States, where there are no ecclesiastical corporations, it would be confined to the latter class, as colleges, schools, and hospitals, and is almost invariably lodged in the trustees of such institutions. Donors or founders in this country rarely possess the authority of visitors, except as they belong to the board of trustees. The authority which the trustees possess in such cases is to manage the funds of the institution, direct its government, administration, and regular discipline, elect and remove officers, provide by-laws, etc.; and if they exercise a prudent discretion in the performance of these duties, they are amenable to no supervision. But courts of equity may exercise a general jurisdiction over their acts and proceedings, to prevent abuses of trust, or a fraudulent perversion of charitable funds. But the term "visitation," as applied to civil corporations, is not strictly appropriate, though such a use of it is common. From denoting supervision of a particular kind, it is extended to supervision of all kinds. Civil corporations, whether public or private, are subject to the general law of the land, and may be made accountable for an abuse or violation of authority, a neglect or disregard of duty, etc., by appropriate legal proceedings. In extreme cases of perversion of power, the corporation may be dissolved.

may also itself be dissolved in several ways, which dissolution is the civil death of the corporation ; and in this case their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation ; for the law doth annex a condition to every such grant, that, if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant faileth. The grant is, indeed, only during the life of the corporation ; which *may* endure forever ; but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life. The debts of a corporation, either to or from it, are totally extinguished by its dissolution ; so that the members thereof cannot recover, or be charged with them, in their natural capacities : agreeable to that maxim of the civil law, "*si quid universitati debetur, singulis non debetur ; nec, quod debet universitas, singuli debent.*"¹⁵

***485]** *A corporation may be dissolved, 1. By Act of parliament, which is boundless in its operations.¹⁶ 2. By the natural

¹⁵ These rules of the common law, in regard to the disposition of the real property of a corporation upon its dissolution, and the extinguishment of its debts, have been generally abolished in this country, at least as far as stock and monied corporations are concerned. The debts still remain valid, and the property is applied as a trust fund to their liquidation. Should any surplus remain, it is divided among the corporators. In New York, there is a statute to this effect, and the directors or trustees of the corporation are declared to be trustees to collect the assets, pay debts and distribute the residue among the stockholders. (*People v. O'Brien*, 111 N. Y. 1 ; see 105 U. S. 13.) Similar statutes are found in other States. So if corporations become bankrupt, their assets are applied to the payment of their indebtedness, as in individual bankruptcy.

¹⁶ As has already been stated, the legislature of a State can pass no law repealing or so far altering or modifying the charter of a private corporation, as to violate the constitutional prohibition against impairing the obligation of contracts. This doctrine was established by the famous *Dartmouth College Case* (4 Wheaton, 518). But if there is a clause in a State Constitution permitting such repeal or modification, laws having this object may be passed in reference to all corporations created after the adoption of such a Constitutional provision. This is because the parties are presumed to understand the state of the law at the time when the charter is granted, and to enter into the contract with reference to existing legislation. So if there be a reservation of the right to repeal or amend in the charter itself, laws for this purpose will be authorized. (*Greenwood v. Freight Co.*, 105 U. S. 13.) But public or municipal corporations are always subject to legislative control. (*Mt. Pleasant v. Beckwith*, 100 U. S. 514.)

death of all its members, in case of an aggregate corporation 3. By surrender of its franchises into the hands of the king, which is a kind of suicide. 4. By forfeiture of its charter, through negligence or abuse of its franchises; in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void. And the regular course is to bring an information in nature of a writ of *quo warranto*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. The exertion of this act of law, for the purposes of the state, in the reigns of King Charles and King James the Second, particularly by seizing the charter of the city of London, gave great and just offence; though perhaps, in strictness of law, the proceedings in most of them were sufficiently regular; but the judgment against that of London was reversed by Act of parliament after the Revolution; and by the same statute it is enacted, that the franchises of the city of London shall never more be forfeited for any cause whatsoever. And because, by the common law, corporations were dissolved, in case the mayor or head officer was not duly elected on the day appointed in the charter, or established by prescription, it is now provided, that for the future no corporation shall be dissolved upon that account; and ample directions are given for appointing a new officer, in case there be no election, or a void one, made upon the prescriptive or charter day.¹⁷

¹⁷ These several modes of dissolution still exist in this country. And it is a general rule in regard to the surrender of the corporate franchises, that the surrender must be accepted by the government. (*New York Iron Works v. Smith*, 4 Duer 362.) Non-user or misuser of the authority granted to the corporation, or an unlawful usurpation of power, will not of itself work a forfeiture of the charter, but the default must be judicially ascertained and declared. (See *Bradt v. Benedict*, 17 N.Y. 93). Actions for the purpose of annulling or vacating the charter, and putting an end to the existence of the corporation, are ordinarily brought by the attorney-general representing the State. But if dissolution be not effected by the appropriate legal proceeding, the rightful existence of the corporation cannot be questioned in any collateral proceeding. (*In re N. Y. Elev. R. Co.*, 70 N. Y. 32.) The corporation will continue to exist, until the State takes measures to dissolve it. There are special statutory provisions in the several States, regulating the institution of such proceedings.

(On the subject of corporations may be consulted such works as *Angell and Ames on Corporations*, *Morawetz on Corporations*, *Kent's Commentaries* (lecture 33), and *Dillon on Municipal Corporations*.)

BOOK THE SECOND.
OF THE RIGHTS OF THINGS

CHAPTER I.

[BL. COMM.--BOOK II. CH. I.]

Of Property, in General.

THE former book of these Commentaries having treated at large of the *jura personarum*, or such rights and duties as are annexed to the *persons* of men, the objects of our inquiry in this second book will be the *jura rerum*, or those rights which a man may acquire in and to such external things as are unconnected with his person. These are what the writers in natural law style the rights of dominion, or property, concerning the nature and original of which I shall first premise a few observations, before I proceed to distribute and consider its several objects.

*There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favor, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and

strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land : why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him : or why the occupier of a particular field or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These inquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reason for making them. But, when law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man "dominion over all the earth ; and over the fish of the sea, and over the fowl of the air, *5] and over everyliving thing that moveth *upon the earth." This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.

These general notions of property were then sufficient to answer all the purposes of human life ; and might perhaps still have answered them had it been possible for mankind to have remained in a state of primeval simplicity : as may be collected from the manners of many American nations when first discovered by the Europeans ; and from the ancient method of living among the first Europeans themselves, if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of these times, wherein "*erant omnia communia et indivisa omnibus, veluti unum sunctis patrimonium esset*" Not that this communion of goods

seems ever to have been applicable, even in the earliest stages, to aught but the *substance* of the thing; nor could it be extended to the *use* of it. For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer: or, to speak with greater precision, the *right* of possession continued for the same time only that the *act* of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force; but the instant that he *quitted [*4 the use or occupation of it, another might seize it, without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit, which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own.

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate *use* only, but the very *substance* of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world be continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession; if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other. In the case of habitations in particular, it was natural to observe, that even the brute creation, to whom everything else was in common, main-

tained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and home-stall; which 5*] seem to have been originally mere *temporary huts or movable cabins, suited to the design of Providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established. And there can be no doubt, but that movables of every kind became sooner appropriated than the permanent substantial soil: partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use, till improved and ameliorated by the bodily labor of the occupant, which bodily labor, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein.

The article of food was a more immediate call, and therefore a more early consideration. Such as were not contented with the spontaneous product of the earth, sought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature; and to establish a permanent property in their flocks and herds in order to sustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle made the article of *water* also a very important point. And therefore the book of Genesis (the most venerable monument of antiquity, considered merely with a view to history) will furnish us with frequent instances of violent contentions concerning wells; the exclusive property of which appears to have been established in the first digger or occupant, even in such places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a sojourner, asserting his right to a well in the country of Abimelech, and exacting

an oath for his security, "because he had digged that well." And Isaac, *about ninety years afterwards, reclaimed that his [*6 father's property; and after much contention with the Philistines, was suffered to enjoy it in peace.

All this while the soil and pasture of the earth remained still in common as before, and open to every occupant; except perhaps in the neighborhood of towns, where the necessity of a sole and exclusive property in lands (for the sake of agriculture) was earlier felt, and therefore more readily complied with. Otherwise, when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seize upon and occupy such other lands as would more easily supply their necessities. This practice is still retained among the wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the East; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty, which was universal in the earliest ages; and which, Tacitus informs us, continued among the Germans till the decline of the Roman empire. We have also a striking example of the same kind in the history of Abraham and his nephew Lot. When their joint substance became so great, that pasture and other conveniences grew scarce, the natural consequence was, that a strife arose between their servants; so that it was no longer practicable to dwell together. This contention Abraham thus endeavored to compose: "Let there be no strife, I pray thee, between thee and me. Is not the whole land before thee? Separate thyself, I pray thee, from me. If thou wilt take the left hand, then I will go to the right; or if thou depart to the right hand, then I will go to the left." This plainly implies an acknowledged right, in either, to occupy whatever ground he pleased, that was not pre-occupied by other tribes. "And Lot lifted up his eyes, and beheld all the plain of Jordan, that it was well watered every where, even as the garden of the Lord. Then Lot chose him all the plain of Jordan, and journeyed east; and Abraham dwelt in the land of Canaan."

Upon the same principle was founded the right of migra- [*7 tion or sending colonies to find out new habitations, when the mother country was overcharged with inhabitants; which was practised as well by the Phœnicians and Greeks as the Germans.

Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert, uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing on countries already peopled, and driving out or massacring the innocent and defenseless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in color : how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants : and by constantly occupying the same individual spot, the fruits of the earth were consumed, and its spontaneous produce destroyed, without any provision for future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence ; and this necessity produced, or at least promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connection and consequence, introduced and established the idea of a more permanent property in the soil than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities, without the assistance of tillage : but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labor ? Had not therefore a separate property in lands, as well as movables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey ; which, according to some philosophers, is 8*] the genuine state of nature. *Whereas now (so graciously has Providence interwoven our duty and our happiness together) the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving its *rational* faculties, as well as of exerting its *natural*. Necessity begat property : and in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants ; states, government, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labor, for the necessary subsistence

of all ; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.

The only question remaining is, how this property became actually vested : or what it is that gave a man an exclusive right to retain in a permanent manner that specific *land*, which before belonged generally to everybody, but particularly to nobody. And, as we before observed that occupancy gave the right to the temporary *use* of the soil, so it is agreed upon all hands, that occupancy gave also the original right to the permanent property in the *substance* of the earth itself : which excludes every one else but the owner from the use of it. There is indeed some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property : Grotius and Puffendorf insisting that this right of occupancy is founded on a tacit and implied assent of all mankind, that the first occupant should become the owner ; and Barbeyrac, Titius, Mr. Locke, and others, holding, that there is no such implied assent, neither is it necessary that there should be ; for that the very act of occupancy, alone, being a degree of bodily labor, is from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title. A dispute that savors too much of nice and scholastic refinement. However, both sides agree in this, that occupancy is the thing by which the title was in fact originally gained ; every man seizing to his own continued *use such spots of ground as he found [*9 most agreeable to his own convenience, provided he found them unoccupied by any one else.

Property, both in lands and movables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it ; for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant. So if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But if he hides it privately in the earth or other secret place, and it is discovered, the finder acquires no property

therein ; for the owner hath not by this act declared any intention to abandon it, but rather the contrary : and if he loses or drops it by accident, it cannot be collected from thence, that he designed to quit the possession ; and therefore in such a case the property still remains in the loser, who may claim it again of the finder. And this, we may remember, is the doctrine of the law of England, with relation to treasure-trove.

But this method of one man's abandoning his property, and another seizing the vacant possession, however well founded in theory, could not long subsist in fact. It was calculated merely for the rudiments of civil society, and necessarily ceased among the complicated interests and artificial refinements of polite and established governments. In these it was found, that what became inconvenient or useless to one man, was highly convenient and useful to another ; who was ready to give in exchange for it some equivalent, that was equally desirable to the former proprietor. Thus mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or *10] conveyance : which *may be considered either as a continuance of the original possession which the first occupant had ; or as an abandoning of the thing by the present owner, and an immediate successive occupancy of the same by the new proprietor. The voluntary dereliction of the owner, and delivering the possession to another individual, amount to a transfer of the property : the proprietor declaring his intention no longer to occupy the thing himself, but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property : and Titius, being the only or first man acquainted with such my intention, immediately steps in and seizes the vacant possession : thus the consent expressed by the conveyance gives Titius a good right against me ; and possession, or occupancy, confirms that right against all the world besides.

The most universal and effectual way of abandoning property, is by the death of the occupant : when, both the actual possession and intention of keeping possession ceasing, the property which is founded upon such possession and intention ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion : else if he had

a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him : which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society : for, then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But as, under civilized governments which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will ; or, in case he neglects to dispose of it, or is not permitted to make any disposition *at all, the municipal law of the [*11 country steps in, and declares who shall be the successor, representative, or heir of the deceased ; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion which its becoming again common would occasion. And farther, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost every country ; whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be formed.

The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view that it has nature on its side ; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political establishment ; since the permanent right of property, vested in the ancestor himself, was no *natural*, but merely a *civil* right. It is true, that the transmission of one's possessions to posterity has an evident tendency to make a man a good citizen and a useful member of society : it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest

and most tender affections. Yet, reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate original arose not from speculations altogether so delicate and refined, and, if not from fortuitous circumstances, at least from a plainer and more simple principle. A man's children or nearest *12] relations are usually about him on his *death-bed, and are the earliest witnesses of his decease. They become therefore generally the next immediate occupants, till at length in process of time this frequent usage ripened into general law. And therefore also in the earliest ages, on failure of children, a man's servants born under his roof were allowed to be his heirs; being immediately on the spot when he died. For, we find the old patriarch Abraham expressly declaring, that "since God had given him no seed, his steward Eliezer, one born in his house, was his heir."

While property continued only for life, testaments were useless and unknown: and, when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will. Till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigence of their families required. This introduced pretty generally the right of disposing of one's property, or a part of it, by *testament*; that is, by written or oral instructions properly *witnessed* and authenticated, according to the *pleasure* of the deceased, which we therefore emphatically style his *will*. This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one-third of his movables from his wife and children; and, in general, no will was permitted of lands till the reign of Henry the Eighth; and then only of a certain portion: for it was not till after the restoration that the power of devising real property became so universal as at present.

Wills therefore and testaments, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid; neither does any thing vary *13] more than the right of inheritance under different *national

establishments. In England particularly, this diversity is carried to such a length, as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be, that has not its foundation in the positive rules of the state. In personal estates the father may succeed to his children ; in landed property he never can be their immediate heir, by any the remotest possibility :¹ in general only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance : in real estates males are preferred to females, and the eldest male will usually exclude the rest ; in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.

This one consideration may help to remove the scruples of many well-meaning persons, who set up a mistaken conscience in opposition to the rules of law. If a man disinherits his son, by a will duly executed, and leaves his estate to a stranger, there are many who consider this proceeding as contrary to natural justice ; while others so scrupulously adhere to the supposed intention of the dead, that if a will of lands be attested by only *two* witnesses instead of *three*, which the law requires, they are apt to imagine that the heir is bound in conscience to relinquish his title to the devisee. But both of them certainly proceed upon very erroneous principles, as if, on the one hand, the son had by nature a right to succeed to his father's lands ; or as if, on the other hand, the owner was by nature entitled to direct the succession of his property after his own decease. Whereas the law of nature suggests, that on the death of the possessor the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society. The positive law of society, which is with us the municipal law of England, directs it to vest in such person as the last proprietor shall by will, attended with certain requisites, appoint ; and, in defect of such appointment, to go to some particular person, who from the result of certain local consti- [*14 tutions, appears to be the heir at law. Hence it follows, that where the appointment is regularly made, there cannot be a shadow of right in any one but the person appointed : and, where

¹ But now it is the general rule, both in England and in this country, that a father may inherit real property from his child, in default of lineal descendants of the latter. This change has been effected by statutory provisions.

the necessary requisites are omitted, the right of the heir is equally strong, and built upon as solid a foundation, as the right of the devisee would have been, supposing such requisites were observed.

But, after all, there are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common ; being such wherein nothing but an usufructuary property is capable of being had ; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills and other conveniences: such also are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untamable disposition ; which any man may seize upon and keep for his own use and pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance ; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.

Again : there are other things in which a permanent property *may* subsist, not only as to the temporary use, but also the solid substance ; and which yet would be frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands ; such also are wrecks, estrays, and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game. With regard to these and some others, as **dis-15***] turbances and quarrels *would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension, by vesting the things themselves in the sovereign of the state : or else in his representatives appointed and authorized by him, being usually the lords of manors. And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner.

CHAPTER II.

[BL. COMM.—BOOK II. CH. II.]

Of Real Property; and, first of Corporeal Hereditaments.

THE objects of dominion or property are *things*, as contradistinguished from *persons*: and things are by the law of England distributed into two kinds; things *real* and things *personal*. Things *real* are such things as are permanent, fixed, and immovable, which cannot be carried out of their place; as lands, and tenements: things *personal* are goods, money, and all other movables; which may attend the owner's person wherever he thinks proper to go.

In treating of things *real*, let us consider, *first*, their several sorts or kinds; *secondly*, the *tenures* by which they may be holden; *thirdly*, the *estates* which may be had in them; and *fourthly*, the *title* to them, and the *manner of acquiring* and *losing* it.

First, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements, or hereditaments. *Land* comprehends all things of a permanent, substantial nature; being a word of a very extensive signification, as will presently appear more at large. *Tenement* is a word of still greater extent, and though in its vulgar *acceptation it is only applied [*17 to houses and other buildings, yet, in its original, proper, and legal sense, it signifies everything that may be *holden*, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind. Thus *liberum tenementum*, frank tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like: and, as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements. But an *hereditament*, says Sir Edward Coke, is by much the largest and most comprehensive expression: for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal or

incorporeal, real, personal, or mixed. Thus an heir-loom, or implement of furniture which by custom descends to the heir together with a house, is neither land, nor tenement, but a mere movable: yet being inheritable, is comprised under the general word hereditament:¹ and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament.²

Hereditaments then, to use the largest expression, are of two kinds, corporeal and incorporeal. Corporeal consist of such as affect the senses; such as may be seen and handled by the body: incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only. For *land*, says Sir Edward Coke, comprehendeth, in its legal signification, any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath.

•18] * It legally includeth also all castles, houses, and other

¹ *Heir-looms*, by the English law, are such personal chattels as go by force of a special custom to the heir along with the inheritance, and not to the executor or administrator of the former owner, as the usual laws for the disposition of personal property require. The rule of law is, that whatever goes to the heir is real property, while whatever goes to the executor or administrator is personal property; so that heir-looms come within the former category. Such are the ancient jewels of the crown; also deeds of land, together with the receptacles in which they are placed; and plate, pictures, furniture, etc., which pass with the mansion-house of the deceased. Heir-looms cannot be disposed of by will, if the land be left to pass to the heir. In American law this doctrine of heir-looms does not exist, unless deeds of land which pass to the heir are regarded as belonging to this class of hereditaments; but this point is not determined.

² By a condition is here meant a qualification or restriction annexed to a conveyance of land, whereby it is provided that in case a particular event does or does not happen, or a particular act is done or omitted to be done, an estate shall commence, be enlarged, or defeated; as, if land be conveyed to a railroad company and its successors, on condition that the company shall construct its line of track thereon within a certain stipulated period. If, in such a case, the condition is broken by non-fulfilment of its requirements, the grantor or his heirs must enter or bring action to recover possession of the land. If this is not done, the estate will still continue in the grantee. (*Nicoll v. Erie R. Co.*, 12 N. Y. 121.) These rules will be reverted to more at length in a subsequent chapter.

buildings: for they consist, saith he, of two things; *land*, which is the foundation, and *structure* thereupon; so that if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of *water* only; either by calculating its capacity, as, for so many cubical yards; or, by superficial measure, for twenty acres of water: or by general description, as for a pond, a watercourse, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water*.³ For water is a movable wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein: wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immovable: and therefore in this I may have a certain substantial property: of which the law will take notice, and not of the other.

Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards.⁴ *Cujus est solum, ejus est*

³ A grant of a river, under that designation, will not include the river-bed, nor an island within it. (*Jackson v. Halstead*, 5 Cow. 216.) If there be between the land of two adjacent owners a stream in which the tide does not ebb and flow (called in law a non-navigable stream), each of them, as a general rule, owns the river-bed to the centre of the stream. (*Seneca Nation v. Knight*, 25 N. Y. 498.) The conveyance of land, therefore, which is bounded upon such a stream, will commonly convey the title to the centre. If such a stream be wholly within one man's premises, he owns the entire bed. But if the river be one in which the tide ebbs and flows (*i. e.*, "navigable,") the soil beneath is vested in the State, while the public generally have a right of passing over such stream in boats, vessels, etc., and of fishing in its waters. But some States adopt a different test as to navigability. (94 U. S. 324.)

A grant of land, bounded upon a highway, will convey the title to the soil as far as the centre of the highway, in the absence of a clear intention to exclude it. (*Bissell v. N. Y. Cent. R. Co.*, 23 N. Y. 61.) But the parties may, by appropriate language in the deed, limit the boundary to the line of the highway. (*Mott v. Mott*, 68 N. Y. 246.)

⁴ If the trunk of a tree stands wholly upon one man's land, while the roots extend into the premises of an adjacent owner, the former is the owner of the whole tree. The same is true if the branches overhang the adjacent premises, and the owner of the land on which the trunk stands is

usque ad cælum, is the maxim of the law ; upwards, therefore no man may erect any building, or the like, to overhang another's land : and, downwards, whatever is in a direct line, between the surface of any land and the centre of the earth, belongs to the owner of the surface ; as is every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but every thing under it, or over it.⁵ And therefore, if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows.⁶ Not but the particular *19] names of the thing are *equally sufficient to pass them, except in the instance of water ; by a grant of which, nothing passes but a right of fishing :⁷ but the capital distinction is this, that by the name of a castle, messuage,⁸ toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of ;⁹ but by the name of

entitled to all the fruit that may grow on the entire tree. But in such cases, the adjacent owner may lop off the branches, or cut off the roots at the dividing line. (*Hoffman v. Armstrong*, 48 N. Y. 201 ; *Dubois v. Beaver*, 25 N. Y. 123.) But if a tree grows upon the dividing line, part of its trunk extending into the lands of neighboring owners, they are tenants in common of the tree, and neither of them has a right to do injury to it of his own will.

⁵ Growing trees, and growing crops or grass, will pass by a conveyance of the land. (*Goodyear v. Vosburgh*, 57 Barb. 243 ; *Austin v. Sawyer*, 9 Cow. 39.) So trees cut and lying upon the land, or blown down by the wind, will pass by the deed. (*Brackett v. Goddard*, 54 Me. 313.)

⁶ But a man, being the owner of land, may sell or otherwise dispose of the minerals within it, retaining the surface, and giving the purchaser only a right of so far breaking the surface, as may be necessary for the purpose of opening a mine. And the ownership of any portion of the space, from the centre of the earth outwards, may be held as a distinct property : a man may have an estate of inheritance, not only in a seam of coal, but even of a story of a house, or a box at a theatre. (Br. & H. Comm. ii. 16.)

⁷ [Or the right to use the water, as in the case of rivers and mill streams.]

⁸ A *messuage* is generally held to include the dwelling-house, together with such outbuildings and immediately adjacent premises as are commonly occupied therewith. Thus, it would include a barn, stable, a garden, orchard, etc. It is usually defined as denoting whatever is included within the "curtilage," or common enclosure about the premises. A *toft*, by old English law, was land upon which a building had fallen to decay, while a *croft* was an enclosed piece of land near a messuage.

⁹ But the grant of a house or other building passes the land on which it stands. So the grant of a mill has been held to pass land adjoining it, which

land, which is *nomen generalissimum*, every thing terrestrial will pass.¹⁰

CHAPTER III.

[BL. COMM. —BOOK II. CH. III.]

Of Incorporeal Hereditaments.

AN incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within the same. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like ; but

was necessary for its use, and was actually used in connection with the mill. The land is said to pass in these cases as *parcel* of the thing expressly conveyed. (*Esty v. Currier*, 98 Mass. 501 ; *Gear v. Barnum*, 37 Conn. 229.) But rights of way over adjacent premises, enjoyed in connection with a piece of land, would pass by a conveyance of such land as “appurtenant” thereto. The distinction is that incorporeal rights which pass are *appurtenant*, while land itself passes as *parcel* of that conveyed, since it is tangible and corporeal. (*Woodhull v. Rosenthal*, 61 N. Y. 382.)

¹⁰ It is important, in this connection, to notice the subject of “*fixtures*.” A fixture may be defined as *an article or structure which, in itself personal property, has been annexed, or has become accessory to real estate*. In some cases, such articles are held to have become real estate by reason of their annexation or connection with land, while in others they are deemed, notwithstanding such annexation, to still remain personal property. It is, therefore, of much consequence to understand the rules of law by which the nature of such articles, with reference to their being real or personal, is to be determined.

It was formerly a well settled doctrine of law, that whatever was attached to land became a part of it, and was, therefore, real estate. This principle was expressed in a Latin maxim, *Quicquid plantatur solo, solo cedit*—i. e., “whatever is affixed to the soil belongs to the soil,” or passes with it. But to this rule several well recognized classes of exceptions have, in the progress of jurisprudence, become established. In determining, therefore, in the present state of the law, whether a personal chattel affixed to land has thereby become real estate, it is necessary to consider the nature of the annexation, the presumable intention with which it has been made, and the parties who are interested in such property, and between whom questions in

something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled: incorporeal hereditaments, regard to its character may arise. These several inquiries may be noticed separately:—

I. The primary inquiry must be, whether there has been a true annexation, in the legal sense of the term. This annexation may either be *actual* or *constructive*. It is actual, when the chattel is really and actually attached to, or connected with the land; constructive, when there is no such real attachment, but the articles, though portable or easily removable, are commonly used in connection with the premises and are properly appurtenant thereto. Thus, mirrors, grates, furnaces, machinery, etc., would be actual fixtures; while door-keys, removable shutters, or detached window-blinds, doors, windows, locks, knobs, or fences, which are to be replaced, would be illustrations of constructive fixtures. But if articles of a personal nature, as boards, bricks, etc., are actually built into a house or other structure which constitutes real estate, they become unquestionably real property, and no inquiry in regard to their being real or personal is necessary. But the term “fixtures” properly applies only to those personal chattels in reference to which such an inquiry may reasonably be prosecuted. So if articles such as planks, boards or other chattels, are merely placed upon land temporarily, or suffered to remain there as a place of deposit, they are beyond question still personal property and not fixtures.

II. The next inquiry, and the one which is of chief importance, is in regard to the probable or reasonably presumable intention with which the addition or annexation was made. Attention is not to be paid so much to the actual intent as to the reasonably presumable intent, with respect to all the circumstances of the case. When land is sold with fixtures thereon, as, *e.g.*, machinery or detached fences, which would naturally and reasonably be deemed to have been intended for the permanent use and improvement of the premises, they will pass to the purchaser as part of the land, notwithstanding the vendor may claim that it was his express purpose only to allow such articles to remain temporarily upon the premises and afterwards to remove them. (12 N. Y. 170; 66 N. Y. 489.) But if the vendor's actual intent be communicated to the purchaser, or the articles thus annexed were mortgaged as chattels, or an agreement were made between the parties that they should still retain their character as personal estate, no distinction could be drawn between real intent and presumed intent, and the rights of the parties would be determined with reference to their understanding. (*Campbell v. Roddy*, 44 N. J. Eq. 244; *Voorhees v. McGinnis*, 48 N. Y. 278; *Potter v. Cromwell*, 40 N. Y. 287; see 61 Mich. 117; 117 Ind. 176.) Where both parties interested concur in a common intent, this must govern their relations and interests in regard to the property. (*Sheldon v. Edwards*, 35 N. Y. 279.) So if the party making the erections intended them to remain personal property, and made an agreement to that effect with a third person, who would be injured

are but a sort of accidents, which inhere in and are supported by that substance ; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely in idea and

if this agreement were not observed and carried out, this intent may be allowed to govern, although another party who has an interest in the premises, would ordinarily be entitled to consider such articles as having become real property. The distinction is between the intent merely of the party adding the fixture, and this intent as affecting third parties. If A. builds machinery into a factory on which B. has a mortgage, and has a secret intent, of which B. knows nothing, that it shall remain personal estate, it will nevertheless be held to be part of the land and bound by the mortgage ; but if A. had made an agreement with C. that the machinery should continue to be a chattel, this agreement would prevail, and B. would have no claim to this addition. (*Tift v. Horton*, 53 N. Y. 377.) (In some States, however, B.'s claim would be preferred, even in such a case.) If annexations are made for purposes of *trade by tenants for years*, the presumed intention is that the tenant purposes to remove them ; for it is not to be supposed that he designs giving them to the landlord, and thus incurring loss himself. Hence, different rules prevail between parties occupying such a relation than in other cases. In addition to the consideration of intention, principles of public policy are of much weight in regard to the law of fixtures. This, for instance, would require that vendors of land should not deceive purchasers by leading them to believe, by the appearance of the premises, that additions thereto passed by the grant, when there was a secret purpose that they should remain personal property ; and, therefore, they should be deemed real estate. But, on the contrary, considerations of public policy would lead to the conclusion that tenants for years should be allowed to remove articles erected for purposes of trade, in order that manufacturing may be encouraged, and industrial enterprise be promoted. Therefore, in this case, annexations for such purposes are rather to be regarded as personal property.

III. The third inquiry is in regard to the parties having interests in the premises and between whom questions in regard to fixtures may arise. They may be divided into two great classes : (A) Parties interested in property on which fixtures have been erected by one having a *permanent* interest therein. These are, (1) heir and executor of one adding the fixtures ; (2) mortgagor and mortgagee, where the former erects the fixtures ; (3) vendor and vendee of land with fixtures thereon ; (4) vendor and contractor to buy land, in a similar case. The second class is (B) Parties interested in property on which fixtures have been erected by one having a *temporary* interest therein. These are, (1) landlord and tenant, where the latter erects the fixtures ; (2) tenant for life and remainder-man or reversioner. This distinction into classes depends to a large extent, as has already been indicated, upon considerations of presumed intent and public policy above considered.

In the first class of cases [those under (A)], the general principle is that attachments to the land constitute a part of it, and are, therefore, real es-

abstracted contemplation ; though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion of an incorporeal hereditament, we must

tate. They will, therefore, (1) pass to the heir rather than to the executor, will (2) form part of the security under a mortgage for the benefit of the mortgagee, will (3) pass to a vendee of the land under a deed, and (4) be embraced within the contract of one who agrees to purchase the land. But this is only true of such annexations as are presumed in law to have been made for the *permanent improvement and habitual enjoyment* of the premises, and to have an adaptability to the ordinary use of the property. Even as between these parties, additions to the land may be personal property. This would be the case when the presumption was that the addition was made only for temporary purposes. The mode of fastening is, in many cases, an important test. Thus, looms merely fastened by screws to keep them steady, have been held to be personal property as between mortgagor and mortgagee. (18 N. Y. 28 ; s. p. 132 Mass. 447.) The same view was taken where machinery was secured to the building merely by cleats. (10 Barb. 157 ; and see 38 N. J. Eq. 575 ; 140 Mass. 416.) But where the machinery of a mill was fastened to the building by means of rods and bolts passing through the frame-timbers and floor-joists, and secured by nuts, and the mill was to be used as a permanent structure for a grist mill for the neighborhood, the machinery was held to be part of the realty. (*Potter v. Cromwell*, 40 N. Y. 287.) The mode and purpose of fastening indicated that the annexation was made for permanency. The great size or bulkiness of the article, or the place where it is erected, are also important to be considered in determining its character. Thus, a colossal statue, weighing with its pedestal about three tons, which was placed as an ornament upon a lawn in front of a house, and rested upon a permanent foundation, was held to be real estate ; so of a sundial placed on a durable base. (*Snedeker v. Waring*, 12 N. Y. 170.) The following cases may also be referred to for the sake of illustration. They all exhibit the application of the same principle, viz., to determine whether the fixture was erected or added for permanency : Thus, hop-poles taken down and piled in the yard, were held to pass, by the deed of the premises, to the vendee (*Bishop v. Bishop*, 11 N. Y. 123) ; so of fencing materials, though temporarily detached from the soil (*Goodrich v. Jones*, 2 Hill, 142) ; and of fixtures put up by the owner to fit the premises for use as a dry goods store (*Tabor v. Robinson*, 36 Barb. 483) ; so of a furnace, as between mortgagor and mortgagee (4 E. D. Sm. 273 ; but not, if easily detachable, 36 N. J. Eq. 61) ; but gas-fixtures, merely screwed on the house-pipes, are chattels (81 N. Y. 38) ; and the rolling-stock of a railroad has been held in New York to be personal property, as between mortgagor and mortgagee (*Hoyle v. Plattsburg, &c., R. R. Co.*, 54 N. Y. 314). In some States, however, it is held to be real estate. Fixtures erected by the owner upon property which has been mortgaged will, as a general rule, be deemed real estate, and be bound by the mortgage, unless the rights of third parties are involved. (*Snedeker v. Waring*, 12 N. Y. 170 ; *Smith Paper Co. v. Servin*, 130 Mass. 511 ; *Wright v. Gray*, 73 Me. 297.)

be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament: for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes, if we consider the *produce of them, as the tenth sheaf or tenth [*21 lamb, seem to be completely corporeal; yet they are indeed incorporeal hereditaments: for they, being merely a contingent springing right, collateral to or issuing out of lands, can never be the object of sense: that casual share of the annual increase is not, till severed, capable of being shown to the eye, nor of being delivered into bodily possession.

(B) In regard to the subject of fixtures, as between landlord and tenant, the rules of law are essentially different. Such additions are treated ordinarily as removable by the tenant before the expiration of his lease, when made,

(1) *For purposes of trade or manufacture*; as, for instance, a cider-mill and press, temporary sheds or buildings, copper-stills and kettles for distilling, engines and machinery, though firmly affixed to a building, etc. (*Hanrahan v. O'Reilly*, 102 Mass. 201; *Ombony v. Jones*, 19 N. Y. 234; *Hey v. Bruner*, 61 Pa. St. 87; *Van Ness v. Packard*, 2 Pet. 137; see 76 N. Y. 23.)

(2) *For agricultural purposes*.—Thus nursery trees may be removed as personal property. (1 Metcalf, 27; see 51 Barb. 196.) In England, the common-law rule was different, though by statute some exceptions have been made.

(3) *For domestic use and convenience, and the necessary enjoyment of the premises*; as, stoves, gas-fixtures, etc. (4 Gray, 256; 77 Pa. St. 437; 1 Duer, 363.) But in all these cases the articles must be removed within the term of the tenant's lease, or during such further period of possession as he holds the premises with right to consider himself as tenant, or they will become the landlord's property. If a tenant erects fixtures, and then the lease is renewed without any agreement in regard to such fixtures, his right to remove them is lost. (45 N. Y. 792; 101 Pa. St. 265; 103 Ind. 203.) But the landlord and tenant may vary their common-law rights in regard to removal by any agreement, not unlawful on other grounds, which they may see fit to make. (*Dubois v. Kelly*, 10 Barb. 496; see 69 Wis. 501; 37 Minn. 459.)

As between a tenant for life and remainder-man or reversioner, the rules are substantially the same as between landlord and tenant for years, and the articles pass to the executor or administrator of the life-tenant. But he has a reasonable time, after the life-tenant's death, in which to remove them.

Additions made to the land by the tenant for other purposes than those here specified, are generally held to be real property, and to belong to the landlord. (*Kissam v. Barclay*, 17 Abb. Pr. 360.) So the tenant cannot remove such annexations as would be substantially destroyed by removal. (149 Mass. 578.)

Incorporeal hereditaments are principally of ten sorts ; advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.¹

I. (III.) Common, or right of common, appears from its very definition to be an incorporeal hereditament : being a profit which a man hath in the land of another ; as to feed his beasts, to catch fish, to dig turf, to cut wood, or the like.² And hence common is chiefly of four sorts ; common of pasture, or piscary, of turbarry, and of estovers.

1. Common of *pasture* is a right of feeding one's beasts on another's land : for in those waste grounds, which are usually called commons, the property of the soil is generally in the lord of the manor ; as in common fields it is in the particular tenants. This kind of common is either appendant, appurtenant, because of vicinage, or in gross.

***33]** *Common *appendant* is a right belonging to the owners or occupiers of arable land, to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Commonable beasts are either beasts of the plough, or such as manure the ground. This is a matter of the most universal right ; and it was originally permitted, not only for the encouragement of agriculture, but for the necessity of the thing. For, when lords of manors granted out parcels of land to tenants, for services either done or to be done, these tenants could not plough or manure the land without beasts ; these beasts could not be sustained without pasture ; and pasture could not be had but in the lord's wastes, and on the unclosed fallow grounds of themselves and the other tenants. The law therefore annexed this right of common, as inseparably incident to the grant of the lands ; and this was the original of common appendant : which obtains in Sweden, and the other northern kingdoms, much in

¹ Those portions of this chapter relating to advowsons, tithes, offices, dignities, corodies or pensions, have been omitted, as being of little importance to the American student.

² [The proper description of a common is, that it is a profit *a prendre*, a right to take or sever something valuable from the land of another ; and this distinguishes it from mere easements, which are rights merely to use or interfere with the use of another's property.] Thus, a right to take fish from another man's waters, would be profit *a prendre* ; a right to send water through a drain in his premises, or to pass over his land habitually, would be an easement.

the same manner as in England. Common *appurtenant* ariseth from no connection of tenure, nor from any absolute necessity: but may be annexed to lands in other lordships, or extend to other beasts, besides such as are generally commonable; as hogs, goats, or the like, which neither plough nor manure the ground. This not arising from any natural propriety or necessity, like common appendant, is therefore not of general right; but can only be claimed by immemorial usage and prescription, which the law esteems sufficient proof of a special grant or agreement for this purpose. Common *because of vicinage*, or neighborhood, is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either. This is indeed only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits: and therefore either township may enclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally *into the other's common; but if they escape, and stray [*34 thither of themselves, the law winks at the trespass. Common *in gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person; being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor.

All these species, of pasturable common, may be and usually are limited as to number and time; but there are also commons *without stint*, and which last all the year. By the statute of Merton, however, and other subsequent statutes, the lord of a manor may enclose so much of the waste as he pleases for tillage or woodground, provided he leaves common sufficient for such as are entitled thereto. This enclosure, when justifiable, is called in law, "*approving*:" an ancient expression signifying the same as "improving." The lord hath the sole interest in the soil; but the interest of the lord and commoner, in the common, are looked upon in law as mutual. They may both bring actions for damage done, either against strangers, or each other; the lord

for the public injury, and each commoner for his private damage.

2, 3. Common of *piscary* is a liberty of fishing in another man's water; as common of *turbary* is a liberty of digging turf upon another's ground. There is also a common of digging for coals, minerals, stones, and the like. All these bear a resemblance to common of pasture in many respects: though in one point they go much further; common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary, and those aforementioned, are a right of carrying away the very soil itself.

*35] *4. Common of estovers or *estouviers*, that is, *necessaries* (from *estoffer*, to furnish), is a liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate. The Saxon word, *bote*, is used by us as synonymous to the French *estovers*: and therefore house-bote is a sufficient allowance of wood, to repair, or to burn in, the house: which latter is sometimes called fire-bote: plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry; and hay-bote, or hedge-bote, is wood for repairing of hays, hedges, or fences. These botes or estovers must be reasonable ones; and such any tenant or lessee may take off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary.

These several species of commons do all originally result from the same necessity as common of pasture; *viz.* for the maintenance and carrying on of husbandry; common of piscary being given for the sustenance of the tenant's family; common of turbary and fire-bote for his fuel; and house-bote, plough-bote, cart-bote, and hedge-bote, for repairing his house, his instruments of tillage, and the necessary fences of his grounds.³

I. (IV.) A fourth species of incorporeal hereditaments is that of *ways*; or the right of going over another man's ground.⁴ I

³ The subject of rights of common is of comparatively little importance in American law, not many cases having arisen in which questions of this kind have been presented. It will only be necessary, therefore, to refer to a few of these cases, for the sake of illustration. (*Smith v. Floyd*, 18 Barb 522; *Livingston v. Ten Broeck*, 16 Johns. 14; *Van Rensselaer v. Radcliff*, 10 Wend. 639; *Worcester v. Green*, 2 Pick. 429.)

⁴ The subject of ways constitutes a branch of the law of *easements*.

speak not here of the king's highways, which lead from town to town; nor yet of common ways, leading from a village into the fields; but of private ways, in which a particular man may have

which is a very important topic in the law of real estate. As this is the only variety of easement considered by Blackstone, the following extract from Broom and Hadley's Commentaries, upon this general topic, will be of interest and value to the student. (Their statements are supplemented by a few additional remarks, which are enclosed in brackets):—

"When the owner of one tenement, called the dominant tenement, has a right to compel the owner of another, called the servient tenement, to permit to be done, or refrain from doing, something which, as owner of his tenement, he would otherwise have been entitled to restrain or to do respectively, such a right is called an *easement*. * * * In order to constitute a valid easement of a kind which the law recognizes, there must exist the two tenements, the dominant and the servient; and besides this, there are other conditions which must be observed. An easement must be limited in extent, and must be in some way for the benefit of the alleged dominant tenement, and not for some general benefit of its owner. Thus, a claim to discharge the foul water of a mill into an adjoining brook, may be a good easement appurtenant to the mill, but a claim by the owner of a house to discharge foul water, *simpliciter*, could not be claimed as an easement appurtenant to the house. Such claims, if made at all, must be supported by a title deduced in a regular way, from a grant to a person and his heirs; they would not pass as appurtenances of any alleged dominant tenement, or under any deed, unless expressly conveyed.

"Among the principal easements which have the sanction of time, and are allowed by law, are the following: The right to water, the right of way, the right to the natural support of land, the right [in some cases] to the support of buildings by adjacent land, and, in some exceptional instances, to such support by adjacent buildings, the right to have party-walls and fences kept in repair, etc. * *

"Easements are [generally] created by grant from the owner of the servient to the owner of the dominant tenement, express, implied, or presumed by law, [as in cases of prescription,] or by reservation, express or implied, out of a grant of the servient tenement. Express grants or reservations must be by deed, in order to create a legal right to the easement, though equity will, where valuable consideration has been given, and great injustice would otherwise ensue, interfere and protect the enjoyment of the easement. (See *Powell v. Thomas*, 6 Hare, 300.) An easement is created by an implied grant in cases where the two tenements, being held by one owner, are dealt with by him so as to sever in part the inheritance, and when the intention of the parties would be frustrated, unless the easement were granted. [See *Butterworth v. Crawford*, 46 N. Y. 349; 43 N. J. Eq. 62; 81 N. Y. 557.] Thus, if a man sells and conveys a piece of land surrounded by another belonging to himself, by implication he grants also a right of way over his own land to that sold. The law implies that, by such a grant to a purchaser, 'that also is granted without which the thing itself cannot be enjoyed;' so

an interest and a right, though another be owner of the soil. This may be granted on a special permission; as when the owner of the land *grants* to another the liberty of passing over when mines or trees are sold, the power of entry to dig shafts, or carry away the timber, is by implication granted. [See *N. Y. Life Ins. Co. v. Milnor*, 1 Barb. Ch. 353.] For a similar reason, an easement may by implication be reserved to a vendor or grantor of the servient tenement. Thus, if a man excepts out of a grant all mines and minerals, he excepts also the right of going upon the land, and making shafts and erecting engines. * * * A distinction is also taken between those easements which are *apparent* and *continuous*, and those which are *discontinuous*, the construction of a grant being more readily extended, so as to create, by implication of grant or reservation, the former than the latter. As an example of the former kind, we may mention the right to light and air across another's premises,* and of the latter, the right to use a pump. [The exact distinction between continuous and discontinuous easements, is this: "Continuous are those of which the enjoyment is, or may be continual, without the necessity of any actual interference by man. Discontinuous are those, the enjoyment of which can be had only by the interference of man, as rights of way, or a right to draw water." (*Lampman v. Milks*, 21 N. Y. 505.)]

[We will consider now the different kinds of easements:] *First, as to the right of water.*—Of this right there are two kinds; one where the water flows in a natural course, and the other where it flows through an artificial drain or canal. The former kind stands upon a somewhat different footing from the majority of easements. Every proprietor must necessarily have been in long enjoyment, and is entitled to have the full benefit of it in the state in which it exists naturally, uncontaminated, and substantially undiminished in quantity by the acts of the owners of the land from which it flows. [See *Clinton v. Myers*, 46 N. Y. 511; 137 Mass. 163; 77 Me. 297.] He may apply it to any purpose he pleases, by way of reasonable enjoyment, so that he does not substantially injure the quantity or quality of that which flows onward to the lands of others. The right, however, exists only in reference to water flowing on the surface, and not to any underground flow of water. An owner of land, in which there is a well supplied by a subterranean flow of water [without any defined channel], cannot complain of his well being drained through the operations of a neighboring mine owner. [See *Village of Delht v. Youmans*, 45 N. Y. 362.]

"The other case of a right of water is where a stream of water runs through an artificial course. This right may be subdivided into two sorts, the right to receive and the right to discharge the water. The latter is the one more easily acquired otherwise than by contract; because, if a man makes an artificial water-course upon his own lands, presumably it is for his own benefit and not that of a neighbor, and he cannot be compelled to con-

* The English doctrine, that a right to the unobstructed passage of light and air over adjacent premises of another owner, may be gained by continuous enjoyment of such a privilege for the period of prescription (usually 20 years) has been generally rejected in this country. This is known as the doctrine of "ancient lights." But such a right may be gained by express grant. (See *Myers v. Gemmel*, 19 Barb. 537; also 64 N. Y. 432.)

his grounds, to go to church, to market, or the like: in which case the gift or grant is particular, and confined to the grantee alone: it dies with the person; and, if the grantee leaves the tinue it after it ceases to be beneficial to him. On the other hand, if he makes a water-course for his own purposes, which runs into his neighbor's land, he is obviously doing that which is an infringement of his neighbor's property. This infringement may, by prescription, at length be legalized, so as to become a right over that land, if suffered to continue without interruption, though, of course, until then his neighbor may at any time block up the water-course, and so put an end to the infringement. [A party acquires a right to the use of water in a particular manner, by an uninterrupted adverse enjoyment of such use during 20 years. (*Townsend v. McDonald*, 12 N. Y. 381.)]

"*The right of way* is the right of going over another man's ground. It may be divided into several kinds, according to the limitation which may govern the enjoyment. Thus, it may be limited to passage on foot, or on horseback, or it may be limited to particular kinds of vehicles, and for special purposes. Like other easements, it is limited to the requirements of the dominant tenement to the ownership of which it is appendant, and the use of such owner and his servants and agents, will regulate the right in those cases where an express grant cannot be produced. [When land conveyed is surrounded wholly by other land of the grantor, or partly by the grantor's land and partly by that of strangers, the right of way which the grantee has over such adjacent premises of the grantor is called "a way of necessity." (136 Mass. 575; 51 Conn. 70; 71 Cal. 62.) But if there is any other means of access to the land granted, which may be rightfully used, a way of necessity will not arise. And when the necessity ceases, as if a new right of way is acquired, the way of necessity ceases. (*N. Y. Ins. Co. v. Milnor*, 1 Barb. Ch. 353, 363.) As a general rule, the person entitled to the right of way is bound to make all necessary repairs, though the owner of the servient estate may be placed under this obligation by agreement on his part, or by prescription. (*Doane v. Badger*, 12 Mass. 65.) The grantee of a right of way to one piece of land cannot make use of it to pass into another adjacent piece. (*French v. Marstin*, 24 N. H. 440; see 15 R. I. 166.)]

"*The right of lateral support to land* by the adjacent land of a different owner, is an easement which exists as a natural accessory of the soil, and may be extended to a house, if properly acquired. If a man digs upon his own ground to such an extent that the land of his neighbor falls, he is liable to an action or a suit in equity to restrain him." [But there is no right of support for buildings erected on adjacent premises, unless they have stood twenty years, so that such a right has been gained by prescription; and if they have stood a shorter period, and fall by reason of excavations carefully conducted on adjoining property, there is no remedy. (*Thurston v. Hancock*, 12 Mass. 226; *Farrand v. Marshall*, 21 Barb. 409; *Lasala v. Holbrook*, 4 Paige, 169; *Johnson v. Oppenheim*, 55 N. Y. 280, 285; s. p. 99 U. S. 635.)]

[One other important easement deserves mention, viz., that of *party walls*. A party wall is a wall between adjacent buildings with a right of support therein, as an easement, for the timbers of such buildings. It usually

country, he cannot assign over his right to any other ; nor can *36] he justify taking another *person in his company. A way may be also by *prescription* ; as if all the inhabitants of such a hamlet, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground for such a particular purpose : for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land or houses may clearly be created. A right of way may also arise by act and operation of law : for, if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come to it ; and I may cross his land for that purpose without trespass. For when the law doth give any thing to one, it giveth impliedly whatsoever is necessary for enjoying the same. By the law of the twelve tables at Rome, where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleased : which was the established rule in public as well as private ways. And the law of England, in both cases, seems to correspond with the Roman.⁵

III. (VII.) Franchises are a seventh species. Franchise and liberty are used as synonymous terms ; and their definition is a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king's grant ; or in some cases may be held by prescription, which, as has been frequently said, presup-

stands upon the dividing line between the two lots, but may stand wholly upon one of the lots and at one side of the line. (*Brown v. Otto*, 40 Md. 15.) The easement in party walls may be created by express or implied grant, prescription, etc. (See *Partridge v. Gilbert*, 15 N. Y. 601 ; also 50 N. Y. 639 and 646 ; 90 N. Y. 663 ; 121 Mass. 457 ; 81 Pa. St. 54.)]

[An easement may be destroyed or extinguished in various ways : as, by release to the owner of the servient tenement ; by abandonment, as where the person entitled to the easement gives a license to erect an obstruction inconsistent with its enjoyment (*Cartwright v. Maplesden*, 53 N. Y. 622) ; by non-user for 20 years of an easement obtained by prescription ; by merger, as where the dominant and servient estates become vested in the same person, etc.]

⁵ This statement needs modification. The person entitled to the right of way is strictly confined to this way, and must use it only for the purposes specified in the grant, reservation, etc. If it be out of repair, he may not pass over the adjacent land, unless the owner thereof is under obligation to make the necessary repairs or has obstructed the way ; but then, it seems, he may do so. (See 59 N. H. 7 ; 126 Mass. 445.)

poses a grant. The kinds of them are various, and almost infinite: I will here briefly touch upon some of the principal; premising only, that they may be vested in either natural persons or bodies politic; in one man or in many; but the same identical franchise, that has before been granted to one, cannot be bestowed on another, for that would prejudice the former grant.

To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise, for a number of persons to be incorporated, and subsist as a body politic; with a power to maintain perpetual succession, and do other corporate acts: and each individual member of such corporation is also said to have a franchise or freedom. Other franchises are, to hold a court leet: to have a manor or lordship; or, at least, to have a lordship paramount: to have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures, and deodands: to have a court of one's own, or liberty of holding pleas, and trying causes: to have the cognizance of pleas; which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction: to have a bailiwick, or liberty, exempt from the sheriff of the county; *wherein the grantee only, [*38 and his officers, are to execute all process: to have a fair or market; with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like; which tolls must have a reasonable cause of commencement (as in consideration of repairs or the like), else the franchise is illegal and void: or lastly, to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty which species of franchise may require a more minute discussion.⁶

⁶ *Franchises* may be defined as special privileges, conferred by government on individuals or corporations, which do not belong to the citizens of the country generally by common right. In the United States, franchises are not so numerous as in England. The most common are, the right to build and maintain ferries, bridges, turn-pike roads, railroads, and the right to be a corporation. These privileges are granted by legislative act, though, in rare instances, they are acquired by prescription. The act of the legislature, conferring such privileges, constitutes a contract with the parties endowed therewith, and cannot be repealed or materially amended by subsequent legislation, unless the right to do so has been properly reserved to the legislature. The franchise constitutes a valuable right of property, which, like other property, cannot be taken, destroyed, or extinguished by the legislature for the construction of public works, or the conferment of other franchises upon different parties, unless appropriate compensation be paid for the rights of property thus

As to a *forest*; this, in the hands of a subject, is properly the same thing with a chase; being subject to the common law, and not to the forest laws. But a *chase* differs from a park, in that it is not enclosed, and also in that a man may have a chase in another man's ground as well as in his own, being indeed the liberty of keeping beasts of chase or royal game therein, protected even from the owner of the land, with a power of hunting them thereon. A *park* is an enclosed chase, extending only over a man's own grounds. The word *park* indeed properly signifies an enclosure; but yet it is not every field or common, which a gentleman pleases to surround with a wall or paling, and to stock with a herd of deer, that is thereby constituted a legal park: for the king's grant, or at least immemorial prescription, is necessary to make it so. Though now the difference between a real park, and such enclosed grounds, is in many respects not very material: only that it is unlawful at common law for any person to kill any beasts of park or chase, except such as possess these franchises of forest, chase, or park. *Free warren* is a similar franchise, erected for preservation or custody (which the word

destroyed, or made valueless. This would be an exercise of the right of eminent domain. An instance of this would be the grant of authority to a bridge company to so erect the bridge as to occupy the place of a former ferry; or, the giving of authority to a railroad corporation to take a bridge which had been erected, under legislative grant, for the construction of the railroad. In all such cases, compensation must be awarded. (*Central Bridge Co. v. Lowell*, 4 Gray, 474; *Matter of Kerr*, 42 Barb. 119.) But this principle does not restrict the legislature from granting or creating new franchises, which only indirectly and consequentially impair the value of those previously granted; as if power be granted to a company to construct a bridge so near another erected under a former franchise, as to divert travel therefrom, and thus diminish its value. But even in such cases if, in the grant of the previous franchise, it had been provided that such subsequent franchises should not be granted, this provision would form an essential ingredient in the contract, and could not therefore be violated, unless repeal or amendment in any form were authorized by law. (*Charles River Bridge Co. v. Warren Bridge Co.* 7 Pick, 344; 11 Peters [U. S.], 420; *Fort Plain Bridge v. Smith*, 30 N. Y. 44.)

This legal use of the word "franchise," must not be confounded with the political sense of the term, denoting the right to vote at a public election. A franchise in law is an interest in the nature of real property, an incorporeal hereditament. As, however, in this country, at least, franchises are almost invariably vested in corporations, questions in regard to their heritable quality do not arise.

signifies) of beasts and fowls of warren ; which being *feræ naturæ*, every one had a right to kill as he could ; but upon *the [*39 introduction of the forest laws, at the Norman Conquest, as will be shown hereafter, these animals being looked upon as royal game and the sole property of our savage monarchs, this franchise of free-warren was invented to protect them ; by giving the grantee a sole and exclusive power of killing such game so far as his warren extended, on condition of his preventing other persons. A man therefore that has the franchise of warren, is in reality no more than a royal gamekeeper ; but no man, not even a lord of a manor, could by common law justify sporting on another's soil, or even on his own, unless he had the liberty of free-warren. This franchise is almost fallen into disregard, since the new statutes for preserving the game, the name being now chiefly preserved in grounds that are set apart for breeding hares and rabbits. There are many instances of keen sportsmen in ancient times who have sold their estates, and reserved the free-warren, or right of killing game, to themselves ; by which means it comes to pass that a man and his heirs have sometimes free-warren over another's ground. A *free fishery*, or exclusive right of fishing in a public river, is also a royal franchise ; and is considered as such in all countries where the feudal polity has prevailed ; though the making such grants, and by that means appropriating what seems to be unnatural to restrain, the use of running water, was prohibited for the future by King John's great charter ; and the rivers that were fenced in his time were directed to be laid open, as well as the forests to be disafforested. This opening was extended by the second and third charters of Henry III. to those also that were fenced under Richard I. ; so that a franchise of free fishery ought now to be at least as old as the reign of Henry II. This differs from a *several* fishery ; because he that has a several fishery must also be (or at least derive his right from) the owner of the soil, which in a free fishery is not requisite. It differs also from a *common* of piscary before mentioned, in that the free fishery is an *exclusive [*40 right, the common of piscary is not so : and therefore, in a free fishery, a man has a property in the fish before they are caught, in a common of piscary not till afterwards. Some indeed have considered a *free* fishery not as a royal franchise, but merely as a private grant of a liberty to fish in the *several* fishery of the

grantor. But to consider such right as originally a flower of the prerogative, till restrained by *magna charta*, and derived by royal grant (previous to the reign of Richard I.) to such as now claim it by prescription, and to distinguish it (as we have done) from a *several* and a *common* of fishery, may remove some difficulties in respect to this matter, with which our books are embarrassed. For it must be acknowledged, that the right and distinctions of the three species of fishery are very much confounded in our law-books ; and that there are not wanting respectable authorities which maintain that a *several* fishery may exist distinct from the property of the soil, and that a *free* fishery implies no exclusive right, but is synonymous with *common* of piscary.

IV (IX.) Annuities are much of the same nature as corodies ; only that they arise from temporal, as the latter from spiritual persons. An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded : a rent-charge being a burthen imposed upon and issuing out of *lands*, whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor. Therefore, if a man by deed grant to another the sum of 20*l.* *per annum*, without expressing out of what lands it shall issue, no land at all shall be charged with it ; but it is a mere personal annuity ; which is of so little account in the law, that if granted to an eleemosynary corporation it is not within the statutes of mortmain ; and yet a man may have a real estate in it, though his security is merely personal.

*41] V. (*X.) Rents are the last species of incorporeal hereditaments. The word rent or render, *reditus*, signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance. It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a *profit* ; yet there is no occasion for it to be, as it usually is, a sum of money ; for spurs, capons, horses, corn, and other matters may be rendered, and frequently are rendered, by way of rent. It may also consist in services or manual operations ; as, to plough so many acres of ground, to attend the king or the lord to the wars, and the like : which services in the eye of the law are profits. This profit must also be *certain* ; or that which may be reduced to a certainty by either party. It must also issue *yearly* ; though there is no occasion for it to issue every successive year ; but it may

be reserved every second, third, or fourth year ; yet, as it is to be produced out of the profits of lands and tenements, as a recompense for being permitted to hold or enjoy them, it ought to be reserved yearly, because those profits do annually arise and are annually renewed. It must *issue out* of the thing granted, and not be part of the land or thing itself ; wherein it differs from an exception in the grant, which is always of part of the thing granted. It must, lastly, issue out of *lands and tenements corporeal* ; that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrain. Therefore a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like. But a grant of such annuity or sum may operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action of debt : though it doth not affect the inheritance, and is no legal rent in contemplation of law.

There are at common law three manner of rents, rent-service, rent-charge, and rent-seck. *Rent-service* is so called *because it hath some corporeal service incident to it, as at [*42 the least fealty or the feudal oath of fidelity. For, if a tenant holds his land by fealty, and ten shillings rent ; or by the service of ploughing the lord's land, and five shillings rent ; these pecuniary rents, being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or arrere, at the day appointed, the lord may distrain of common right, without reserving any special power of distress ; provided he hath in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired. A *rent-charge* is where the owner of the rent hath no future interest, or reversion expectant in the land : as where a man by deed maketh over to others his *whole* estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be arrere, or behind, it shall be lawful to distrain for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed ; and therefore, it is called a *rent-charge*, because in this manner the land is charged with a distress for the payment of it. *Rent-seck*, *reditus siccus*, or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress.

There are also other species of rents, which are reducible to these three. Rents of *assize* are the certain established rents of the freeholders and ancient copyholders of a manor, which cannot be departed from or varied. Those of the freeholders are frequently called *chief-rents*, *reditus capitales*, and both sorts are indifferently denominated *quit-rents*, *quieti reditus*: because thereby the tenant goes quit and free of all other services. When these payments were reserved in silver or white money, they were anciently called *white-rents*, *blanch-farms*, *reditus albi*; in contradistinction to rents reserved in work, grain, or baser *48] money, which were called **reditus nigri*, or *black-mail*. *Rack-rent* is only a rent of the full value of the tenement, or near it. A *fee-farm* rent is a rent-charge issuing out of an estate in fee; of at least one-fourth of the value of the lands, at the time of its reservation: for a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee-simple instead of the usual methods for life or years

These are the general divisions of rents; but the difference between them (in respect to the remedy for recovering them) is now totally abolished; and all persons may have the like remedy by distress for rent-seck, rents of assize, and chief-rents, as in case of rents reserved upon lease.⁷

Rent is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation; but in case of the king, the payment must be either to his officers at the exchequer, or to his receiver in the country. And strictly the rent is demandable and payable before the time of sunset of the day whereon it is reserved; though perhaps not absolutely due till midnight.⁸

⁷ The remedy by distress for the recovery of rent has been abolished in a number of the States in this country. The chief distinction, therefore, between rent-service and rent-charge is that in the former case there is a reversion in the property, vested in the person entitled to the rent, while in the latter there is no such reversion. Thus, as between a landlord and tenant for years, the rent would be rent-service; while if the owner of land in fee should convey it in fee to another, reserving a certain rent as a mode of payment, this would be a rent-charge. (See *Van Rensselaer v. Hays*, 19 N. Y. 68; *Van Rensselaer v. Chadwick*, 22 N. Y. 33; *Cruger v. McLaurry*, 41 N. Y. 219, 227, note.) Rents of assize, chief-rents, white-rents, black-rents, etc., are now of little importance. As to rent-charge, see 44 & 45 Vict. c. 41, s. 44.

⁸ These common-law rules in regard to the demand and payment of rent

With regard to the original of rents, something will be said in the next chapter ; and, as to distresses and other remedies for their recovery, the doctrine relating thereto, and the several proceedings thereon, these belong properly to the third part of our Commentaries, which will treat of civil injuries, and the means whereby they are redressed.

CHAPTER IV.

[BL. COMM.—BOOK II. CH. IV.]

Of the Feudal System.

IT is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom, or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feuds, or the feudal law : a system so universally received throughout Europe upwards of twelve centuries ago, that Sir Henry Spelman does not scruple to call it the law of nations in our western world. This chapter will be therefore dedicated to this inquiry, And though, in the course of our observations in this and many other parts of the present book, we may have occasion to search pretty highly into the antiquities of our English jurisprudence, yet surely no industrious student will imagine his time misemployed, when he is led to consider that the obsolete doctrines of our laws are frequently the foundation upon which what remains is erected ; and that it is impracticable to comprehend many rules of the modern law, in a scholar-like scientific manner, without having recourse to the ancient. Nor will these researches be altogether void of rational entertainment as well as use : in viewing the majestic ruins of Rome or Athens, of Balbec or Palmyra, it administers both pleasure and instruction to compare them with the draught of the same edifices, in their pristine proportion and splendor.

*The constitution of feuds had its original from the [*45

have been in a number of States modified or superseded by statutory provisions, prescribing other methods. The statutes of any particular State should be specially consulted.

military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who all migrating from the same *officina gentium*, as Crag very justly entitles it, poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman empire. It was brought by them from their own countries, and continued in their respective colonies as the most likely means to secure their new acquisitions: and to that end, large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers. These allotments were called *feoda*, feuds, fiefs or fees; which last appellation in the northern language signifies a conditional stipend or reward. Rewards or stipends they evidently were: and the condition annexed to them was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given; for which purpose he took the *juramentum fidelitatis*, or oath of fealty: and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them.

Allotments, thus acquired, naturally engaged such as accepted *46] them to defend them: and, as they all sprang from *the same right of conquest, no part could subsist independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each other's possessions. But, as that could not effectually be done in a tumultuous irregular way, government, and to that purpose subordination, was necessary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to, and under the command of, his immediate benefactor or superior, and so upwards to the prince or general himself: and the several lords were also reciprocally bound, in their respective gradations, to protect the possessions they had given. Thus the feudal connection was established, a proper military subjection was naturally introduced, and an army of feudatories was always ready enlisted, and mutually prepared to muster, not only in defense of each man's own several property, but also in defense of the whole, and of every part of this their

newly-acquired country ; the produce of which constitution was soon sufficiently visible in the strength and spirit with which they maintained their conquests.¹

The universality and early use of this feudal plan, among all those nations, which in complaisance to the Romans we still call barbarous, may appear from what is recorded of the Cimbri and Teutones, nations of the same northern original as those whom we have been describing, at their first irruption into Italy about a century before the Christian era. They demanded of the Romans, "*ut martius populus aliquid sibi terræ daret, quasi stipendium ; cæterum, ut vellet, manibus atque armis suis uteretur.*" The sense of which may be thus rendered ; they desired stipendiary lands (that is, feuds) to be allowed them, to be held

¹ Mr. Hallam and various other writers have given a somewhat different account of the origin of the feudal system. This may be briefly summarized as follows : The feudal system had its origin in the conditions under which society existed and land was held under the barbaric conquerors, the Franks, who, with Clovis and his successors, the Merovingian and Carolingian monarchs at their head, overspread Europe. The lands so acquired by the Franks were termed allodial, a description, which in later times, was opposed to feudal or beneficiary, meaning that they were possessed in absolute ownership, subject to no burden, except the performance of the universal duty of public defense. They passed to the children equally, or, on failure of children, to the nearest kindred. From this descendible quality, the word "allodial" was afterwards not uncommonly used synonymously with heritable. In the general distribution of lands, moreover, a very considerable share was reserved for the maintenance of the dignity of the Crown. These lands, called the fiscal lands, were dispersed over different parts of the kingdom, and formed the only regular source of revenue which in those times the sovereigns possessed. Afterwards, these demesne lands of the Crown, or the fisc, were granted under the title of benefices to favored subjects, or subjects whose fidelity it was of importance to secure, upon conditions creating a close relationship between the grantee and his lord. Originally they were in general granted only for life, but in very early times they became hereditary. Of these conditions, there can be little doubt that an oath of fidelity and the render of military service, constituted the most important. When grants from the Crown made in this manner became common, there naturally arose the custom of the great lords who owned large territories granting portions of their land to others, to be held of themselves upon a like species of tenure. This was called sub-infeudation, and at a later period became universal. "Out of these ancient grants, now become for the most part hereditary, these grew up in the tenth century, both in name and reality, the system of feudal tenures." (Broom & H. Comm., ii. 119, 120 ; see Hallam's Middle Ages, i. 167.)

by military and other personal services, whenever their lord should call upon them. This was evidently the same constitution that displayed itself more fully about seven hundred years afterwards; when the Sali, Burgundians and Franks broke in *47] upon Gaul, the Visigoths on *Spain, and the Lombards upon Italy; and introduced with themselves this northern plan of polity, serving at once to distribute and to protect the territories they had newly gained. And from hence too it is probable that the Emperor Alexander Severus took the hint of dividing lands conquered from the enemy among his generals and victorious soldiery, duly stocked with cattle and bondmen, on condition of receiving military service from them and their heirs for ever.

Scarce had these northern conquerors established themselves in their new dominions, when the wisdom of their constitutions, as well as their personal valor, alarmed all the princes of Europe, that is, of those countries which had formerly been Roman provinces, but had revolted, or were deserted by their old masters, in the general wreck of the empire. Wherefore most, if not all, of them thought it necessary to enter into the same or a similar plan of policy. For whereas, before, the possessions of their subjects were perfectly *allodial* (that is, wholly independent, and held of no superior at all), now they parcelled out their royal territories, or persuaded their subjects to surrender up and retake their own landed property, under the like feudal obligations of military fealty. And thus, in the compass of a very few years, the feudal constitution, or the doctrine of tenure, extended itself over all the western world. Which alteration of landed property, in so very material a point, necessarily drew after it an alteration of laws and customs: so that the feudal laws soon drove out the Roman, which had hitherto so universally obtained, but now became for many centuries lost and forgotten; and Italy it self (as some of the civilians, with more spleen than judgment, have expressed it) *belluinas, atque ferinas, immanesque Longobardorum leges accepit*.

*48] *But this feudal polity, which was thus by degrees established over all the continent of Europe, seems not to have been received in this part of our island, at least not universally, and as a part of the national constitution, till the reign of William the Norman. Not but that it is reasonable to believe, from abundant traces in our history and laws, that even in the time of

the Saxons, who were a swarm from what Sir William Temple calls the same northern hive, something similar to this was in use; yet not so extensively, nor attended with all the rigor that was afterwards imported by the Normans. For the Saxons were firmly settled in this island, at least as early as the year 600: and it was not till two centuries after, that feuds arrived at their full vigor and maturity, even on the continent of Europe.

This introduction, however, of the feudal tenures into England, by King William, does not seem to have been effected immediately after the Conquest, nor by the mere arbitrary will and power of the conqueror; but to have been gradually established by the Norman barons, and others, in such forfeited lands as they received from the gift of the conqueror, and afterwards universally consented to by the great council of the nation, long after his title was established. Indeed, from the prodigious slaughter of the English nobility at the battle of Hastings, and the fruitless insurrections of those who survived, such numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extensive possessions: which gave a handle to the monkish historians, and such as have implicitly followed them, to represent him as having by right of the sword seized on all the lands of England, and dealt them out again to his own favorites. A supposition, grounded upon a mistaken sense of the word *conquest*; which in its feudal acceptation, signifies no more than *acquisition*; and this has led many hasty writers into a strange historical mistake, and one which, upon the slightest examination, will *be found to be most untrue. However, [*49 certain it is, that the Normans now began to gain very large possessions in England; and their regard for the feudal law under which they had long lived, together with the king's recommendation of this policy to the English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the continent, were probably the reasons that prevailed to effect its establishment here by law. And, though the time of this great revolution in our landed property cannot be ascertained with exactness, yet there are some circumstances that may lead us to a probable conjecture concerning it. For we learn from the Saxon chronicle, that in the nineteenth year of King William's reign an invasion was apprehended from Denmark; and the military constitution of the Saxons being then laid aside,

and no other introduced in its stead, the kingdom was wholly defenceless ; which occasioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppressed the people. This apparent weakness, together with the grievances occasioned by a foreign force, might co-operate with the king's remonstrances, and the better incline the nobility to listen to his proposals for putting them in a posture of defence. For as soon as the danger was over, the king held a great council to inquire into the state of the nation : the immediate consequence of which was the compiling of the great survey called domesday-book, which was finished in the next year : and in the latter end of that very year the king was attended by all his nobility at Sarum ; where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person. This may possibly have been the era of formally introducing the feudal tenures by law ; and perhaps the very law, thus made at the council of Sarum, is that which is still extant, *50] *and couched in these remarkable words : “ *Statuimus, ut omnes liberi homines foedere et sacramento affirmant, quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt ; terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere.*” The terms of this law (as Sir Martin Wright has observed) are plainly feudal : for, first, it requires the oath of fealty, which made, in the sense of the feudists, every man that took it a tenant or vassal : and, secondly, the tenants obliged themselves to defend their lord's territories and titles against all enemies foreign and domestic. But what clearly evinces the legal establishment of this system, is another law of the same collection, which exacts the performance of the military feudal services, as ordained by the general council. “ *Omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti, habeant et teneant se semper bene in armis et in equis, ut decet et oportet : et sint semper prompti et bene parati, ad servitium suum integrum nobis explendum et peragendum, cum opus fuerit : secundum quod nobis debent de feodis et tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri prædicti.*”

This new polity seems therefore not to have been *imposed* by

the conqueror, but nationally and freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security. And, in particular, they had the recent example of the French nation before their eyes; which had gradually surrendered up all its allodial or free lands into the king's hands, who restored them to the owners as a *beneficium* or feud, to be held to them and such of their heirs as they previously nominated to the king: and thus by degrees all the allodial estates in France were converted into feuds, and the freemen became the vassals of the crown. The only difference between this change of tenures in France, and that in England, was, that the former ^{was} effected gradually ^{by the consent of private persons}: the latter was [*51 done at once, all over England, by the common consent of this nation.

In consequence of this change, it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures, "that the king is the universal lord and original proprietor of all the lands in his kingdom: and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services." For this being the real case in pure, original, proper feuds, other nations who adopted this system were obliged to act upon the same supposition, as a substruction and foundation of their new polity, thought the fact was indeed far otherwise. And indeed, by thus consenting to the introduction of feudal tenures, our English ancestors probably meant no more than to put the kingdom in a state of defense by establishing a military system; and to oblige themselves (in respect of their lands) to maintain the king's title and territories, with equal vigor and fealty, *as if* they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudatories. But whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feudal constitutions, and well understanding the import and extent of the feudal terms, gave a very different construction to this proceeding; and thereupon took a handle to introduce not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations; as if the English had, in fact as well as

theory, owed every thing they had to the bounty of their sovereign lord.

Our ancestors, therefore, who were by no means beneficiaries, *52] but had barely consented to this fiction of tenure from *the crown, as the basis of a military discipline, with reason looked upon these deductions as grievous impositions, and arbitrary conclusions from principles that, as to them, had no foundation in truth. However, this king and his son William Rufus kept up with a high hand all the rigors of the feudal doctrines : but their successor, Henry I. found it expedient, when he set up his pretensions to the crown, to promise a restitution of the laws of king Edward the Confessor, or ancient Saxon system ; and accordingly, in the first year of his reign, granted a charter, whereby he gave up the greater grievances, but still reserved the fiction of feudal tenure, for the same military purposes which engaged his father to introduce it. But this charter was gradually broken through, and the former grievances were revived and aggravated, by himself and succeeding princes ; till in the reign of King John they became so intolerable, that they occasioned his barons, or principal feudatories, to rise up in arms against him ; which at length produced the famous great charter at Runing-mead, which with some alterations, was confirmed by his son Henry III. And though its immunities (especially as altered on its last edition by his son) are very greatly short of those granted by Henry I., it was justly esteemed at the time a vast acquisition to English liberty. Indeed, by the farther alteration of tenures that has since happened, many of these immunities may now appear, to a common observer, of much less consequence than they really were when granted : but this, properly considered, will show, not that the acquisitions under John were small, but that those under Charles were greater. And from hence also arises another inference ; that the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness ; but a restoration of that ancient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of the Norman arms.

*53] *Having given this short history of their rise and progress, we will next consider the nature, doctrine, and principal laws of

feuds ; wherein we shall evidently trace the groundwork of many parts of our public polity, and also the original of such of our own tenures as were either abolished in the last century, or still remain in force.

The grand and fundamental maxim of all feudal tenure is this : that all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown. The grantor was called the proprietor, or *lord* : being he who retained the dominion or ultimate property of the feud or fee ; and the grantee, who had only the use and possession, according to the terms of the grant, was styled the feudatory, or *vassal*, which was only another name for the tenant, or holder of the lands ; though, on account of the prejudices which we have justly conceived against the doctrines that were afterwards *grafted* on this system, we now use the word *vassal* opprobriously, as synonymous to slave or bondman. The manner of the grant was by words of gratuitous and pure donation, *dedi et concessi* ; which are still the operative words in our modern infeudations or deeds of feoffment. This was perfected by the ceremony of corporeal investiture, or open and notorious delivery of possession in the presence of the other vassals : which perpetuated among them the era of the new acquisition, at a time when the art of writing was very little known ; and therefore the evidence of property was reposed in the memory of the neighborhood ; who, in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs, adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

Besides an oath of *fealty*, or profession of faith to the lord, which was the parent of our oath of allegiance, the vassal or tenant upon investiture did usually *homage* to his lord ; openly and humbly kneeling, being ungirt, uncovered, *and holding [*54 up his hands both together between those of the lord, who sat before him ; and there professing, that “ he did become his *man*, from that day forth, of life and limb and earthly honor : ” and then he received a kiss from his lord. Which ceremony was denominated *homagium*, or *manhood*, by the feudists, from the stated form of words, *devenio vester homo*.

When the tenant had thus professed himself to be the man of his superior or lord, the next consideration was concerning

the *service*, which as such, he was bound to render, in recompense for the land that he held. This, in pure, proper, and original feuds, was only two-fold; to follow, or do *suit* to, the lord in his courts in time of peace; and in his armies or warlike retinue, when necessity called him to the field. The lord was, in early times, the legislator and judge over all his feudatories: and therefore the vassals of the inferior lords were bound by their fealty to attend their domestic courts baron (which were instituted in every manor or barony for doing speedy and effectual justice to all the tenants), in order as well to answer such complaints as might be alleged against themselves, as to form a jury or homage for the trial of their fellow-tenants; and upon this account, in all the feudal institutions both here and on the continent, they are distinguished, by the appellation of the peers of the court; *pares curtis*, or *pares curiæ*. In like manner the barons themselves, or lords of inferior districts, were denominated peers of the king's court, and were bound to attend him upon summons, to hear causes of greater consequence in the king's presence, and under the direction of his grand justiciary; till in many countries the power of that officer was broken and distributed into other courts of judicature, the peers of the king's *55] court still reserving to themselves (in *almost every feudal government) the right of appeal from those subordinate courts in the last resort. The military branch of service consisted in attending the lord to the wars, if called upon, with such a retinue and for such a number of days, as were stipulated at the first donation, in proportion to the quantity of the land.

At the first introduction of feuds, as they were gratuitous, so also they were precarious, and held at the *will* of the lord, who was then the sole judge whether his vassal performed his services faithfully. Then they became certain for one or more *years*. Among the ancient Germans they continued only from year to year; an annual distribution of lands being made by their leaders in their general councils or assemblies. This was professedly done lest their thoughts should be diverted from war to agriculture, lest the strong should encroach upon the possessions of the weak, and lest luxury and avarice should be encouraged by the erection of permanent houses, and too curious an attention to convenience and the elegant superfluities of life. But, when the general migration was pretty well over, and a peaceable posses-

sion of the new-acquired settlements had introduced new customs and manners ; when the fertility of the soil had encouraged the study of husbandry, and an affection for the spots they had cultivated began naturally to arise in the tillers ; a more permanent degree of property was introduced, and feuds began now to be granted for the *life* of the feudatory. But still feuds were not yet *hereditary*, though frequently granted, by the favor of the lord, to the children of the former possessor ; till in process of time it became unusual, and was therefore thought hard, to reject the heir, if he were capable to perform the services ; and therefore infants, women, and professed monks, who were incapable of *bearing arms, were also incapable of succeeding to a [*56 genuine feud. But the heir, when admitted to the feud which his ancestor possessed, used generally to pay a fine or acknowledgment to the lord, in horses, arms, money, and the like, for such renewal of the feud ; which was called a relief, because it raised up and re-established the inheritance, or in the words of the feudal writers, "*incertam et caducam hereditatem relevabat.*" This relief was afterwards, when feuds became absolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceased.

For in process of time feuds came by degrees to be universally extended beyond the life of the first vassal, to his *sons*, or perhaps to such one of them as the lord should name ; and in this case the form of the donation was strictly observed : for if a feud was given to a man and his *sons*, all his sons succeeded him in equal portions : and, as they died off, their shares reverted to their lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation. But when such a feud was given to a man and his *heirs*, in general terms, then a more extended rule of succession took place ; and when the feudatory died, his male descendants *in infinitum* were admitted to the succession. When any such descendant, who thus had succeeded, died, his male descendants were also admitted in the first place ; and, in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others. For this was an unalterable maxim in feudal succession, that "none was capable of inheriting a feud, but such as was of the blood of, that is, lineally descended from, the first feudatory." And the descent being

thus confined to males, originally extended to all the males alike ; all the sons, without any distinction of primogeniture, succeeding to equal portions of the father's feud. But this being found upon many accounts inconvenient (particularly, by dividing the services, and thereby weakening the strength of the feudal union), and *honorary* feuds (or titles of nobility) being now introduced, which were not of ^a divisible nature, but could only be inherited by the eldest son ; in imitation of these, *military* feuds (or those we are now describing) began also in most countries to descend, according to the same rule of primogeniture, to the eldest son, in exclusion of all the rest.

Other qualities of feuds were, that the feudatory could not alien or dispose of his feud ; neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord. For the reason of conferring the feud being the personal abilities of the feudatory to serve in war, it was not fit he should be at liberty to transfer this gift, either from himself, or from his posterity who were presumed to inherit his valor, to others who might prove less able. And, as the feudal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection, in return for his own fealty and service ; therefore the lord could no more transfer his seignory or protection without consent of his vassal, than the vassal could his feud without consent of his lord : it being equally unreasonable, that the lord should extend his protection to a person to whom he had exceptions, and that the vassal should owe subjection to a superior not of his own choosing.

These were the principal, and very simple, qualities of the genuine or original feuds ; which were all of a military nature, and in the hands of military persons ; though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants : obliging them to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without distraction : which returns, or *reditus*, were the original of rents, and by these means, the feudal polity was greatly extended ; these inferior feudatories (who held what are called in the Scots law "*rere-fiefs*") being under similar obligations of fealty, to do suit of court, to answer the stipulated renders or rent-service, and to promote the wel-

fare of their immediate superiors or lords. *But this at [*58 the same time demolished the ancient simplicity of feuds; and an inroad being once made upon their constitution, it subjected them, in a course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession; which were held no longer sacred, when the feuds themselves no longer continued to be purely military. Hence these tenures began now to be divided into *feoda propria et impropria*, proper and improper feuds; under the former of which divisions were comprehended such, and such only, of which we have before spoken; and under that of improper or derivative feuds were comprised all such as do not fall within the other descriptions; such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honorable services, or upon a rent, in lieu of military service; such as were in themselves alienable, without mutual license; and such as might descend indifferently either to males or females. But, where a difference was not expressed in the creation, such new created feuds did in all respects follow the nature of an original, genuine, and proper feud.

But as soon as the feudal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the subtilty of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon, began also to exert its influence on this copious and fruitful subject: in pursuance of which, the most refined and oppressive consequences were drawn from what originally was a plan of simplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defence. From this one foundation, in different countries of Europe, very different superstructures have been raised: what effect it has produced on the landed property of England, will appear in the following chapters.

CHAPTER V.

[BL. COMM.—BOOK II. CH. V.]

Of the Ancient English Tenures.

IN this chapter we shall take a short view of the ancient tenures of our English estates, or the manner in which lands, tenements, and hereditaments, might have been holden, as the same stood in force, till the middle of the last century. In which we shall easily perceive, that all the particularities, all the seeming and real hardships, that attended those tenures, were to be accounted for upon feudal principles and no other ; being fruits of, and deduced from, the feudal policy.

Almost all the real property of this kingdom is, by the policy of our laws, supposed to be granted by, dependent upon, and *holden* of, some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore styled a *tenement*, the possessors thereof *tenants*, and the manner of their possession a *tenure*. Thus all the land in the kingdom is supposed to be holden, mediately or immediately, of the king, who is styled the lord *paramount*, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king : and, thus partaking of a middle nature, were called *mesne*, or middle, lords. So that if the king granted a manor to A, and he granted a portion of the land to B, now B *60] was said to hold *of A, and A of the king ; or, in other words B held his lands immediately of A, but mediately of the king. The king therefore was styled lord paramount ; A was both tenant and lord, or was a *mesne* lord : and B was called tenant *paravail*, or the lowest tenant ; being he who was supposed to make avail, or profit of the land. In this manner are all the lands of the kingdom holden, which are in the hands of subjects : for, according to Sir Edward Coke, in the law of England we have not

properly *allodium* ; which, we have seen, is the name by which the feudists abroad distinguish such estates of the subject, as are not holden of any superior. So that at the first glance we may observe, that our lands are either plainly feuds, or partake very strongly of the feudal nature.

All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief ; which was the most honorable species of tenure, but at the same time subjected the tenants to greater and more burthen some services, than inferior tenures did. This distinction ran through all the different sorts of tenure, of which I now proceed to give an account.

I. There seems to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced : the grand criteria of which were the natures of the several services or renders, that were due to the lords from their tenants. The services, in respect of their quality, were either free or base services ; in respect of their quantity and the time of exacting them, were either certain or uncertain. *Free services* were such as were not unbecoming the character of a soldier or a freeman to perform ; *as to serve under his lord in the wars, [*61 to pay a sum of money, and the like. Base services were such as were only fit for peasants or persons of a servile rank ; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The *certain* services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence ; as, to pay a stated annual rent, or to plough such a field for three days. The *uncertain* depended upon unknown contingencies ; as, to do military service in person, or pay an assessment in lieu of it, when called upon ; or to wind a horn whenever the Scots invaded the realm ; which are free services ; or to do whatever the lord should command ; which is a base or villein service.

From the various combinations of these services have arisen the four kinds of lay tenure which subsisted in England till the middle of the last century ; and three of which subsist to this day. Of these Bracton (who wrote under Henry the Third) seems to give the clearest and most compendious account, of any author ancient or modern ; of which the following is the outline

or abstract. "Tenements are of two kinds, *frank-tenement* and *villénage*. And, of frank-tenements, some are held freely in consideration of homage and *knight-service*; others in *free-socage* with the service of fealty only." And again, "of villénages some are pure, and others privileged. He that holds in *pure villénage* shall do whatever is commanded him, and always be bound to an uncertain service. The other kind of villénage is called *villein-socage*; and these villein-socmen do villein services, but such as are certain and determined." Of which the sense seems to be as follows: first, where the service was *free* but *uncertain*, as military service with homage, that tenure was called the tenure in *62] **chivalry, per servitium militare*, or by knight-service. Secondly, where the service was not only *free*, but also *certain*, as by fealty only, by rent and fealty, *etc.*, that tenure was called *liberum socagium*, or *free socage*. These were the only *free* holdings or tenements; the others were *villénous* or servile, as thirdly, where the service was *base* in its nature, and *uncertain* as to time and quantity, the tenure was *purum villénagium*, absolute or pure villénage. Lastly, where the service was *base* in its nature, but reduced to a *certainty*, this was still villénage, but distinguished from the other by the name of privileged villénage, *villénagium privilegiatum*; or it might still be called socage (from the certainty of its services), but degraded by their *baseness* into the inferior title of *villanum socagium*, villein-socage.

I. The first, most universal, and esteemed the most honorable species of tenure, was that by knight-service, called in Latin *servitium militare*; and in law French, *chivalry*, or *service de chivaler*, answering to the *fief d'haubert* of the Normans, which name is expressly given it by the Mirror. This differed in very few points, as we shall presently see, from a pure and proper feud, being entirely military, and the general effect of the feudal establishment in England. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare*; the measure of which in 3 Edw. I. was estimated at twelve ploughlands, and its value (though it varied with the times), in the reigns of Edward I. and Edward II., was stated at 20*l.* *per annum*. And he who held this proportion of land (or a whole fee) by knight-service, was bound to attend his lord to the wars for forty days in every year, if called upon; which attendance was his *reditus* or return, his rent or

service for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend twenty days, and so in proportion. And there is reason to *apprehend, that this ser- [*63 vice was the whole that our ancestors meant to subject themselves to ; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feudal system.

This tenure of knight-service had all the marks of a strict and regular feud : it was granted by words of pure donation, *dedi et concessi* ; was transferred by investiture or delivering corporal possession of the land, usually called livery of seizin ; and was perfected by homage and fealty. It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry ; *viz.*, aids, relief, primer seizin, wardship, marriage, fines for alienation, and escheat : all which I shall endeavor to explain, and to show to be of feudal original.

1. Aids were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress ; but in process of time, they grew to be considered as a matter of right, and not of discretion. These aids were principally three ; first, to ransom the lord's person, if taken prisoner ; a necessary consequence of the feudal attachment and fidelity : insomuch that the neglect of doing it, whenever it was in the vassal's power, was by the strict rigor of the feudal law an absolute forfeiture of his estate. Secondly, to make the lord's eldest son a knight ; a matter that was formerly attended with great ceremony, pomp, and expense. This aid could not be demanded till the heir was fifteen years old, or capable of bearing arms : the intention of it being to breed up the eldest son and heir apparent of the seignory, to deeds of arms and chivalry, for the better defence of the nation. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion : for daughters' portions were in those days extremely slender, few lords being able to save much out of *their income for this purpose ; nor could they acquire [*64 money by other means, being wholly conversant in matters of arms ; nor, by the nature of their tenure, could they charge their lands with this or any other incumbrances. From bearing their proportion to these aids, no rank or profession was exempted : and therefore even the monasteries, till the time of their dissolution, contributed to the knighting of their founder's male heir (of

whom their lands were holden), and the marriage of his female descendants. And one cannot but observe in this particular the great resemblance which the lord and vassal of the feudal law bore to the patron and client of the Roman republic ; between whom also there subsisted a mutual fealty, or engagement of defence and protection. For, with regard to the matter of aids, there were three which were usually raised by the client; *viz.*, to marry the patron's daughter ; to pay his debts ; and to redeem his person from captivity.

But besides these ancient feudal aids, the tyranny of lords by degrees exacted more and more : as, aids to pay the lord's debts (probably in imitation of the Romans), and aids to enable him to pay aids or reliefs to his superior lord ; from which last indeed the king's tenants *in capite* were, from the nature of their tenure, excused, as they held immediately of the king, who had no superior. To prevent this abuse, King John's *magna charta* ordained that no aids be taken by the king without consent of parliament, nor in anywise by inferior lords, save only the three ancient ones above mentioned. But this provision was omitted in Henry III.'s charter, and the same oppressions were continued till the 25 Edward I. when the statute called *confirmatio chartarum* was enacted ; which in this respect revived King John's charter, by ordaining that none but the ancient aids should be taken. But though *65] the species of aids was thus *restrained, yet the quantity of each aid remained arbitrary and uncertain. King John's charter indeed ordered, that all aids taken by inferior lords should be reasonable ; and that the aids taken by the king of his tenants *in capite* should be settled by parliament. But they were never completely ascertained and adjusted till the statute Westm. I, 3 Edw. I., c. 36., which fixed the aids of inferior lords at twenty shillings, or the supposed twentieth part of the annual value of every knight's fee, for making the eldest son a knight, or marrying the eldest daughter : and the same was done with regard to the king's tenants *in capite* by statute 25 Edw. III., c. 11. The other aid, for ransom of the lord's person, being not in its nature capable of any certainty, was therefore never ascertained.

2. Relief, *relevium*, was before mentioned as incident to every feudal tenure, by way of fine or composition with the lord for taking up the estate which was lapsed or fallen in by the death of the last tenant. But though reliefs had their original while

feuds were only life-estates, yet they continued after feuds became hereditary ; and were therefore looked upon, very justly, as one of the greatest grievances of tenure : especially when, at the first, they were merely arbitrary and at the will of the lord ; so that, if he pleased to demand an exorbitant relief, it was in effect to disinherit the heir. The English ill brooked this consequence of their new-adopted policy ; and therefore William the Conqueror by his law *ascertained* the relief, by directing (in imitation of the Danish heriots) that a certain quantity of arms, and habiliments of war, should be paid by the earls, barons, and vavasours respectively ; and if the latter had no arms, they should pay 100s. William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feudal laws : thereby in effect obliging every heir to new-purchase or *redeem* his land : but his brother Henry I., by the charter before mentioned, restored his father's law ; *and ordained, that the [*66 relief to be paid should be according to the law so established, and not an arbitrary redemption. But afterwards, when, by an ordinance in 27 Hen. II., called the assize of arms, it was provided that every man's armor should descend to his heir, for defence of the realm ; and it thereby became impracticable to pay these acknowledgments in arms according to the laws of the conqueror, the composition was universally accepted of 100s. for every knight's fee ; as we find it ever after established. But it must be remembered, that this relief was only then payable, if the heir at the death of his ancestor had attained his full age of one-and-twenty years.

3. *Primer seizin* was a feudal burthen, only incident to the king's tenants *in capite*, and not to those who held of inferior or mesne lords. It was a right which the king had, when any of his tenants *in capite* died seized of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands, if they were in immediate possession : and half a year's profits, if the lands were in reversion expectant on an estate for life. This seems to be little more than an additional relief, but grounded upon this feudal reason ; that by the ancient law of feuds, immediately upon the death of a vassal, the superior was entitled to enter and take seizin or possession of the land, by way of protection against intruders, till the heir appeared to claim it, and receive investiture : during which interval the lord

was entitled to take the profits; and, unless the heir claimed within a year and a day, it was by the strict law a forfeiture. This practice however seems not to have long obtained in England, if ever, with regard to tenure under inferior lords; but as to the king's tenures *in capite*, the *prima seisin*a was expressly declared, under Henry III. and Edward II., to belong to the king by prerogative, in contradistinction to other lords. The *67] king was entitled to enter and receive the *whole profits of the land, till livery was sued; which suit being commonly made within a year and day next after the death of the tenant, in pursuance of the strict feudal rule, therefore the king used to take as an average the *first fruits*, that is to say, one year's profits of the land. And this afterwards gave a handle to the popes, who claimed to be feudal lords of the church, to claim in like manner from every clergyman in England, the first year's profits of his benefice, by way of *primitiæ*, or first fruits.

4. These payments were only due if the heir was of full age; but if he was under the age of twenty-one, being a male, or fourteen, being a female, the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males, and sixteen in females. For the law supposed the heir-male unable to perform knight-service till twenty-one: but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the service. The lord therefore had no wardship, if at the death of the ancestor the heir-male was of the full age of twenty-one, or the heir-female of fourteen; yet, if she was then under fourteen, and the lord once had her in ward, he might keep her so till sixteen, by virtue of the statute of Westm. 1, 3 Edw. I., c. 22., the two additional years being given by the legislature for no other reason but merely to benefit the lord.

This wardship, so far as it related to land, though it was not nor could be part of the law of feuds, so long as they were arbitrary, temporary, or for life only, yet, when they became hereditary, and did consequently often descend upon infants, who by reason of their age could neither perform nor stipulate for the services of the feud, does not seem upon feudal principles to have been unreasonable. For the wardship of the land, or cus

tody of the feud, was retained by the lord, that he might, out of the profits thereof, provide a fit person *to supply the in- [*68 fant's services, till he should be of age to perform them himself. And if we consider the feud in its original import, as a stipend, fee, or reward for actual service, it could not be thought hard that the lord should withhold the stipend, so long as the service was suspended. Though undoubtedly to our English ancestors, where such a stipendiary donation was a mere supposition or figment, it carried abundance of hardship; and accordingly it was relieved by the charter of Henry I. before mentioned, which took this custody from the lord, and ordained that the custody, both of the land and the children, should belong to the widow or next of kin. But this noble immunity did not continue many years.

The wardship of the body was a consequence of the wardship of the land; for he who enjoyed the infant's estate was the properest person to educate and maintain him in his infancy: and also, in a political view, the lord was most concerned to give his tenant suitable education, in order to qualify him the better to perform those services which, in his maturity, he was bound to render.

When the male heir arrived to the age of twenty-one, or the heir-female to that of sixteen, they might sue out their livery or *ousterlemain*; that is, the delivery of their lands out of their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profit of the land; though this seems expressly contrary to *magna charta*. However, in consideration of their lands having been so long in ward, they were excused all reliefs, and the king's tenants also all primer seizins. In order to ascertain the profits that arose to the crown by these first fruits of tenure, and to grant the heir his livery, the itinerant justices or justices in eyre, had it formerly in charge to make inquisition concerning them by a jury of the county, commonly called an *inquisitio post mortem*; which was instituted to inquire (at the death of any man of fortune) the value of his estate, the tenure by which it was *holden, and who, and of what age [*69 his heir was; thereby to ascertain the relief and value of the primer seizin, or the wardship and livery accruing to the king thereupon. A manner of proceeding that came in process of time to be greatly abused, and at length an intolerable grievance

it being one of the principal accusations against Empson and Dudley, the wicked engines of Henry VII., that by color of false inquisitions they compelled many persons to sue out livery from the crown, who by no means were tenants thereunto. And afterwards, a court of wards and liveries was erected, for conducting the same inquiries in a more solemn and legal manner.

When the heir thus came of full age, provided he held a knight's fee *in capite* under the crown, he was to receive the order of knighthood, and was compellable to take it upon him, or else pay a fine to the king. For in those heroical times, no person was qualified for deeds of arms and chivalry, who had not received this order, which was conferred with much preparation and solemnity. We may plainly discover the footsteps of a similar custom in what Tacitus relates of the Germans, who, in order to qualify their young men to bear arms, presented them in full assembly with a shield and lance ; which ceremony, as was formerly hinted, is supposed to have been the original of the feudal knighthood. This prerogative, of compelling the king's vassals to be knighted, or to pay a fine, was expressly recognized in Parliament by the statute *de militibus*, 1 Edw. II. ; was exerted as an expedient for raising money by many of our best princes, particularly by Edward VI., and Queen Elizabeth ; but yet was the occasion of heavy murmurs when exerted by Charles I. : among whose many misfortunes it was, that neither himself nor his people seemed able to distinguish between the arbitrary stretch, and the legal exertion of prerogative. How-
*70] ever, among the other concessions made by *that unhappy prince, before the fatal recourse to arms, he agreed to divest himself of this undoubted flower of the crown, and it was accordingly abolished by statute 16 Car. I., c. 20.

5. But, before they came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards ; I mean the right of *marriage* (*maritagium*, as contradistinguished from *matrimony*), which, in its feudal sense, signifies the power, which the lord or guardian in chivalry had of disposing of his infant ward in matrimony. For, while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without *disparagement* or inequality ; which, if the infants refused, they forfeited the value of the marriage, *valorem maritagi*, to their guardian ; that is, so much

as a jury would assess, or any one would *bona fide* give to the guardian for such an alliance; and, if the infants married themselves without the guardian's consent, they forfeited double the value, *duplicem valorem maritagii*. This seems to have been one of the greatest hardships of our ancient tenures. There were indeed substantial reasons why the lord should have the *restraint* and *control* of the ward's marriage, especially of his female ward; because of their tender years, and the danger of such female wards intermarrying with the lord's enemy; but no tolerable pretence could be assigned why the lord should have the *sale* or *value* of the marriage. Nor indeed is this claim of strictly feudal original; the most probable account of it seeming to be this: that by the custom of Normandy the lord's consent was necessary to the marriage of his *female* wards; which was introduced into England, together with the rest of the Norman doctrine of feuds: and it is likely that the lords usually took money for such their consent, since, in the often-cited charter of Henry the First, he engages for the future to take nothing for *his* consent; which also he promises in general to give, provided such female ward were not *married [*71 to his enemy. But this, among other beneficial parts of that charter, being disregarded, and guardians still continuing to dispose of their wards in a very arbitrary unequal manner, it was provided by King John's great charter that heirs should be married without disparagement, the next of kin having previous notice of the contract; or, as it was expressed in the first draught of that charter, *ita maritentur ne disparagentur, et per consilium propinquorum de consanguinitate sua*. But these provisions in behalf of the relations were omitted in the charter of Henry III.; wherein the clause stands merely thus, "*hæredes maritentur absque disparagatione*:" meaning certainly, by *hæredes*, heirs female, as there are no traces before this to be found of the lord's claiming the marriage of heirs male; and as Glanvil expressly confines it to heirs female. But the king and his great lords thenceforward took a handle (from the ambiguity of this expression) to claim them both, *sive sit masculus sive femina*, as Bracton more than once expresses it: and also as nothing but disparagement was restrained by *magna charta*, they thought themselves at liberty to make all other advantages that they could. And afterwards this right of selling the ward in marriage,

or else receiving the price or value of it, was expressly declared by the statute of Merton; which is the first direct mention that I have met of it, in our own or any other law.¹

6. Another attendant or consequence of tenure by knight-service was that of *finés* due to the lord for every *alienation*, whenever the tenant had occasion to make over his land to another. This depended on the nature of the feudal connection; it not being reasonable or allowed, as we have before seen, that a feudatory should transfer his lord's gift to another, and substitute a new tenant to do the service in his own stead, without the *72] consent of the lord; and, as the *feudal obligation was considered as reciprocal, the lord also could not alienate his seignory without the consent of his tenant, which consent of his was called an *attornment*. This restraint upon the lords soon wore away; that upon the tenants continued longer. For when every thing came in process of time to be bought and sold, the lords would not grant a license to their tenant to alien, without a fine being paid; apprehending that, if it was reasonable for the heir to pay

¹ [What fruitful sources of revenue these wardships and marriages of the tenants, who held lands by knight's service, were to the crown, will appear from the two following instances, collected among others by Lord Lyttleton (Hist. Hen. II. 2 vol. 296): "John Earl of Lincoln gave Henry the Third 3000 marks to have the marriage of Richard de Clare, for the benefit of Matilda, his eldest daughter; and Simon de Montford gave the same king 10,000 marks to have the custody of the lands and heir of Gilbert de Unfranville, with the heir's marriage, a sum equivalent to a hundred thousand pounds at present." In this case the estate must have been large, the minor young, and the alliance honorable. For, as Mr. Hargrave informs us, who has well described this species of guardianship, "the guardian in chivalry was not accountable for the profits made of the infant's lands, during the wardship, but received them for his own private emolument, subject only to the bare maintenance of the infant. And this guardianship, being deemed more an interest for the profit of the guardian, than a trust for the benefit of the ward, was saleable and transferable, like the ordinary subjects of property, to the best bidder; and if not disposed of, was transmissible to the lord's personal representatives. Thus the custody of the infant's person, as well as the care of his estate, might devolve upon the most perfect stranger to the infant; one prompted by every pecuniary motive to abuse the delicate and important trust of education, without any ties of blood or regard to counteract the temptations of interest, or any sufficient authority to restrain him from yielding to their influence." (Co. Litt. 88, n. 11.) One cannot read this without astonishment, that such should continue to be the condition of the country till the year 1660, which, from the extermination of these feudal oppressions, ought to be regarded as a memorable era in the history of our law and liberty.]

a fine or relief on the renovation of his paternal estate, it was much more reasonable that a stranger should make the same acknowledgment on his admission to a newly-purchased feud. With us in England, these fines seem only to have been exacted from the king's tenants *in capite*, who were never able to alien without a license: but as to common persons, they were at liberty by *magna charta*, and the statute of *quia emptores* (if not earlier), to alien the whole of their estate, to be holden of the same lord as they themselves held it of before. But the king's tenants *in capite* not being included under the general words of these statutes could not alien without a license; for if they did, it was in ancient strictness an absolute forfeiture of the land; though some have imagined otherwise. But this severity was mitigated by the statute, 1 Edw. III., c. 12, which ordained, that in such case the lands should not be forfeited, but a reasonable fine be paid to the king. Upon which statute it was settled, that one-third of the yearly value should be paid for a license of alienation; but if the tenant presume to alien without a license, a full year's value should be paid.

7. The last consequence of tenure in chivalry was *escheat*; which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant from the extinction of the blood of the latter by either natural or civil means: if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony whereby every inheritable quality was entirely blotted out *and abolished. In [*73 such cases the lands escheated, or fell back to the lord of the fee; that is, the tenure was determined by breach of the original condition expressed or implied in the feudal donation. In the one case there were no heirs subsisting of the blood of the first feudatory or purchaser, to which heirs alone the grant of the feud extended; in the other, the tenant, by perpetrating an atrocious crime, showed that he was no longer to be trusted as a vassal, having forgotten his duty as a subject; and therefore forfeited his feud, which he held under the implied condition that he should not be a traitor or a felon. The consequence of which in both cases was, that the gift, being determined, resulted back to the lord who gave it.

These were the principal qualities, fruits, and consequences of tenure, by knight-service: a tenure, by which the greater part

of the lands in this kingdom were holden, and that principally of the king *in capite*, till the middle of the last century; and which was created, as Sir Edward Coke expressly testifies, for a military purpose, viz., for defence of the realm by the king's own principal subjects, which was judged to be much better than to trust to hirelings or foreigners. The description here given is that of a knight-service proper; which was to attend the king in his wars. There were also some other species of knight-service; so called, though improperly, because the service or render was of a free and honorable nature, and equally uncertain as to the time of rendering as that of knight-service proper, and because they were attended with similar fruits and consequences. Such was the tenure by *grand serjeanty*, *per magnum servitium*, whereby the tenant was bound, instead of serving the king *generally* in his wars, to do some special honorary service to the king in person; as to carry his banner, his sword, or the like; or to be his butler, champion, or other officer, at his coronation. It was in most other respects like knight-service; only he was not bound to pay *74] aid, or escuage; * and, when the tenant by knight-service paid five pounds for a relief on every knight's fee, tenant by grand serjeanty paid one year's value of his land, were it much or little. Tenure by *cornage*, which was to wind a horn when the Scots or other enemies entered the land, in order to warn the king's subjects, was (like other services of the same nature) a species of grand serjeanty.

These services, both of chivalry and grand serjeanty, were all personal, and uncertain as to their quantity or duration. But, the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it; by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium* in Latin, or *servitium scuti*; *scutum* being then a well-known denomination for money: and, in like manner, it was called, in our Norman French, *escuage*; being indeed a pecuniary, instead of a military, service. The first time this appears to have been taken was in the 5 Hen. II., on account of his expedition to Toulouse; but it soon came to be so universal, that personal attendance fell quite into disuse.

Hence we find in our ancient histories, that, from this period, when our kings went to war, they levied scutages on their tenants that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops ; and these assessments in the time of Hen. II., seem to have been made arbitrarily, and at the king's pleasure. Which prerogative being greatly abused by his successors, it became matter of national clamor ; and King John was obliged to consent by his *magna charta*, that no scutage should be imposed without consent of parliament. But this clause was omitted in his son Henry III.'s charter, where we only find that scutages *or escuage should be taken as they [*75 were used to be taken in the time of Henry II. : that is in a reasonable and moderate manner. Yet afterwards by statute 25 Edw. I., c. 5, 6, and many subsequent statutes, it was again provided, that the king should take no aids or tasks but by the common assent of the realm : hence it was held in our old books, that escuage or scutage could not be levied but by consent of parliament ; such scutage being indeed the ground work of all succeeding subsidies, and the land-tax of later times.

Since, therefore, escuage differed from knight-service in nothing, but as a compensation differs from actual service, knight-service is frequently confounded with it. And thus Littleton must be understood, when he tells us, that tenant by homage, fealty, and escuage, was tenant by knight-service : that is, that this tenure (being subservient to the military policy of the nation) was respected as a tenure in chivalry. But as the actual service was uncertain, and depended upon emergencies, so it was necessary that this pecuniary compensation should be equally uncertain, and depend on the assessments of the legislature suited to those emergencies. For had the escuage been a settled invariable sum, payable at certain times, it had been neither more nor less than a mere pecuniary rent ; and the tenure, instead of knight-service, would have then been of another kind, called socage, of which we shall speak in the next chapter.

For the present I have only to observe, that by the degenerating of knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real) of the feudal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen, bound by their

interest, their honor, and their oaths, to defend their king and *76] country, the whole of this system of *tenures now tended to nothing else but a wretched means of raising money to pay an army of occasional mercenaries. In the mean time the families of all our nobility and gentry groaned under the intolerable burthens which (in consequence of the fiction adopted after the Conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages to which they were liable in defect of personal attendance, which however were assessed by themselves in parliament, they might be called upon by the king or lord paramount for *aids*, whenever his eldest son was to be knighted, or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of *relief* and *primer seizin*; and if under age, of the whole of his estate during infancy. And then, as Sir Thomas Smith very feelingly complains, "when he came to his own, after he was out of *wardship*, his woods decayed, house fallen down, stock wasted and gone, lands let forth and ploughed to be barren," to reduce him still farther, he was yet to pay half a year's profits as a fine for suing out his *livery*; and also the price or value of his *marriage*, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value, if he married another woman. Add to this, the untimely and expensive honor of *kighthood*, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a *license of alienation*.

A slavery so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances. Till at length the humanity of King James I. consented, in consideration of a proper equivalent, to abolish them all; though the *77] plan *proceeded not to effect; in like manner as he had formed a scheme, and begun to put it in execution, for removing the feudal grievance of heritable jurisdiction in Scotland, which has since been pursued and effected by the statute 20 Geo. II., ch

43. King James's plan for exchanging our military tenures seems to have been nearly the same as that which has been since pursued ; only with this difference, that, by way of compensation for the loss which the crown and other lords would sustain, an annual fee-farm rent was to have been settled and inseparably annexed to the crown and assured to the inferior lords, payable out of every knight's fee within their respective seignories. An expedient seemingly much better than the hereditary excise, which was afterwards made the principal equivalent for these concessions. For at length the military tenures, with all their heavy appendages (having, during the usurpation, been discontinued,) were destroyed at one blow by the statute 12 Car. II., c. 24, which enacts "that the court of wards and liveries, and all wardships, liveries, primer seizins, and ousterlemains, values and forfeitures of marriage, by reason of any tenure of the king or others, be totally taken away. And that all fines for alienation, tenures by homage, knight-service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the king *in capite*, be likewise taken away. And that all sorts of tenures, held of the king or others, be turned into free and common socage ; save only tenures in frankalmoign, copyholds, and the honorary services (without the slavish part) of grand serjeanty." A statute, which was a greater acquisition to the civil property of this kingdom than even *magna charta* itself ; since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigor ; but the statute of King Charles extirpated the whole, and demolished both root and branches.

CHAPTER VI.

[BL. COMM.—BOOK II. CH. VI.]

Of the Modern English Tenures.

ALTHOUGH, by the means that were mentioned in the preceding chapter, the oppressive or military part of the feudal constitution itself was happily done away, yet we are not to imagine that the constitution itself was utterly laid aside, and a new one

introduced in its room ; since by the statute, 12 Car. II., the tenures of socage and frankalmoign, the honorary services of grand serjeanty, and the tenure by copy of court roll, were reserved ; nay, all tenures in general, except frankalmoign, grand serjeanty, and copyhold, were reduced to one general species of tenure, then well known, and subsisting, called *free and common socage*. And this, being sprung from the same feudal original as the rest, demonstrates the necessity of fully contemplating that ancient system ; since it is that alone to which we can recur, to explain any seeming or real difficulties, that may arise in our present mode of tenure.

The military tenure, or that by knight-service, consisted of what were reputed the most free and honorable services, but which in their nature were unavoidably uncertain in respect to the time of their performance. The second species of tenure, or *free-socage*, consisted also of free and honorable services ; but such as were liquidated and reduced to an absolute certainty. *79] And this tenure not only subsists to * this day, but has in a manner absorbed and swallowed up (since the statute of Charles the Second) almost every other species of tenure. And to this we are next to proceed.

II. Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service. And in this sense it is by our ancient writers constantly put in opposition to chivalry, or knight-service, where the render was precarious and uncertain. Thus Bracton ; if a man holds by rent in money, without any escuage or serjeanty, "*id tenementum dici potest socagium*:" but if you add thereto any royal service ; or escuage, to any, the smallest, amount, "*illud dici poterit feodum militare*." So too the author of Fleta ; "*ex donationibus, servitia militaria vel magnae serjantiae non continentibus, oritur nobis quoddam nomen generale, quod est socagium*." Littleton also defines it to be, where the tenant holds his tenement of the lord by any *certain* service, in lieu of all other services ; so that they be not services of chivalry, or knight-service. And, therefore, afterwards he tells us, that whatsoever is not tenure in chivalry is tenure in socage: in like manner as it is defined by Finch, a tenure to be done out of war. The service must therefore be certain, in order to denominate it socage ; as to hold by fealty and 20s. rent ; or, by homage, fealty, and 20s. rent : or, by homage and fealty without rent ; or, by fealty and certain corporeal

service, as ploughing the lord's land for three days ; or, by fealty only without any other service: for all these are tenures in socage.

But socage, as was hinted in the last chapter, is of two sorts : *free* socage, where the services are not only certain, but honorable, and *villein*-socage, where the services, though certain, are of a baser nature. Such as hold by the former tenure are called in Glanvil, and other subsequent authors, by the name of *liberi sokemanni*, or tenants in free-socage. Of this tenure we are first to speak: and this, both in the *nature of its service, and [*80 the fruits and consequences appertaining thereto, was always by much the most free and independent species of any. And, therefore, I cannot but assent to Mr. Somner's etymology of the word ; who derives it from the Saxon appellation *soc*, which signifies liberty or privilege, and being joined to a usual termination, is called *socage*, in Latin *socagium* ; signifying thereby a free or privileged tenure. This etymology seems to me much more just than that of our common lawyers in general, who derive it from *soca*, an old Latin word, denoting (as they tell us) a plough : for that in ancient time this socage tenure consisted in nothing else but services of husbandry, which the tenant was bound to do to his lord, as to plough, sow, or reap for him ; but that in process of time, this service was changed into an annual rent by consent of all parties, and that, in memory of its original, it still retains the name of socage or plough-service. But this by no means agrees with what Littleton himself tells us, that to hold by fealty only, without paying any rent, is tenure in socage ; for here is plainly no commutation for plough-service. Besides, even services, confessedly of a military nature and original (as escuage, which, while it remained uncertain, was equivalent to knight-service), the instant they were reduced to a certainty changed both their name and nature, and were called socage. It was the *certainty*, therefore, that denominated it a socage tenure ; and nothing sure could be a greater liberty or privilege, than to have the service ascertained, and not left to the arbitrary calls of the lord, as the tenures of chivalry. Wherefore also Britton, who describes lands in socage tenure under the name of *fraunke ferme*, tells us, that they are " lands and tenements, whereof the nature of the fee is changed by feoffment *out of chivalry* for *certain* yearly services, and in respect whereof neither homage, ward, marriage, nor relief can be demanded." Which leads us also to

another observation, that if socage tenures were of such base and *81] servile *original, it is hard to account for the very great immunities which the tenants of them always enjoyed ; so highly superior to those of the tenants by chivalry, that it was thought, in the reigns of both Edward I. and Charles II., a point of the utmost importance and value to the tenants, to reduce the tenure by knight-service to *fraunke ferme* or tenure by socage. We may, therefore, I think, fairly conclude in favor of Somner's etymology, and the liberal extraction of the tenure in free socage, against the authority even of Littleton himself.

Taking this, then, to be the meaning of the word, it seems probable that the socage tenures were the relics of Saxon liberty ; retained by such persons as had neither forfeited them to the king, nor been obliged to exchange their tenure, for the more honorable, as it was called, but, at the same time, more burthensome, tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in Kent, called gavelkind, which is generally acknowledged to be a species of socage tenure ; the preservation whereof inviolate from the innovations of the Norman conqueror is a fact universally known. And those who thus preserved their liberties were said to hold in *free* and *common* socage.

As therefore the grand criterion and distinguishing mark of this species of tenure are the having its renders or services ascertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties : and in particular, *petit serjeanty*, tenure in *burgage*, and *gavelkind*.

We may remember that by the statute, 12 Car. II., grand serjeanty is not itself totally abolished, but only the slavish appendages belonging to it : for the honorary services (such as carrying the king's sword or banner, officiating as his butler, carver, &c., at the coronation) are still reserved. Now *petit serjeanty* bears a great resemblance to grand serjeanty ; for as the one is a personal service, so the other is a rent or render, both *82] tending to some purpose relative to the king's *person. Petit serjeanty, as defined by Littleton, consists in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like. This, he says, is but socage in effect : for it is no personal service, but a certain rent : and, we may add, it is clearly no predial service, or service of the plough, but in all respects

liberum et commune socagium : only being held of the king, it is by way of eminence dignified with the title of *parvum servitium regis*, or petit serjeanty. And *magna charta* respected it in this light, when it enacted, that no wardship of the lands or body should be claimed by the king in virtue of a tenure by petit serjeanty.

Tenure in *burgage* is described by Glanvil, and is expressly said by Littleton, to be but tenure in socage : and it is where the king or other person is lord of an ancient borough, in which the tenements are held by a rent certain. It is indeed only a kind of town socage ; as common socage, by which other lands are holden, is usually of a rural nature. A borough, as we have formerly seen, is usually distinguished from other towns by the right of sending members to parliament ; and, where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. Tenure in burgage, therefore, or burgage tenure, is where houses, or lands which were formerly the site of the houses, in an ancient borough, are held of some lord in common socage, by a certain established rent. And these seem to have withstood the shock of the Norman encroachments principally on account of their insignificancy, which made it not worth while to compel them to an alteration of tenure ; as a hundred of them put together would scarce have amounted to a knight's fee. Besides, the owners of them, being chiefly artificers and persons engaged in trade, could not with any tolerable propriety be put on such a military establishment, as the tenure in chivalry was. And here also we have again an instance, where a tenure is confessedly in socage, and yet could not possibly ever have been held by plough-service ; since the *ten- [*83 ants must have been citizens or burghers, the situation frequently a walled town, the tenement a single house ; so that none of the owners was probably master of a plough, or was able to use one, if he had it. The free socage, therefore, in which these tenements are held, seems to be plainly a remnant of Saxon liberty ; which may also account for the great variety of customs, affecting many of these tenements so held in ancient burgage : the principal and most remarkable of which is that called *Borough English*, so named in contradistinction as it were to the Norman customs, and which is taken notice of by Glanvil and by Littleton ; viz. that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father. For

which Littleton gives this reason ; because the younger son, by reason of his tender age, is not so capable as the rest of his brethren to help himself. Other authors have indeed given a much stranger reason for this custom, as if the lord of the fee had anciently a right of concubinage with his tenant's wife on her wedding night ; and that therefore the tenement descended not to the eldest, but the youngest son, who was more certainly the offspring of the tenant. But I cannot learn that ever this custom prevailed in England, though it certainly did in Scotland (under the name of *mercheta* or *marcheta*), till abolished by Malcolm III. And perhaps a more rational account than either may be fetched (though at a sufficient distance) from the practice of the Tartars ; among whom, according to Father Duhalde, this custom of descent to the youngest son also prevails. That nation is composed totally of shepherds and herdsmen ; and the elder sons, as soon as they are capable of leading a pastoral life, migrate from their father with a certain allotment of cattle ; and go to seek a new habitation. The youngest son, therefore, who continues latest with his father, is naturally the heir of his house, the rest being already provided for. And thus we find that, among many other northern nations, it was the custom for all the *84] sons but one to migrate from the father, which one *became his heir. So that possibly this custom, wherever it prevails, may be the remnant of that pastoral state of our British and German ancestors, which Cæsar and Tacitus describe. Other special customs there are in different burgage tenures ; as that, in some, the wife shall be endowed of *all* her husband's tenements, and not of the third part only, as at the common law : and that, in others, a man might dispose of his tenements by will, which, in general, was not permitted after the Conquest till the reign of Henry the Eighth ; though in the Saxon times it was allowable. A pregnant proof that these liberties of socage tenure were fragments of Saxon liberty.

The nature of the tenure in *gavelkind* affords us a still stronger argument. It is universally known what struggles the Kentish men made to preserve their ancient liberties, and with how much success those struggles were attended. And as it is principally here that we meet with the custom of gavelkind, (though it was and is to be found in some other parts of the kingdom), we may fairly conclude that this was a part of those liberties ; agreeably to Mr. Selden's opinion, that gavelkind before the

Norman Conquest was the general custom of the realm. The distinguishing properties of this tenure are various; some of the principal are these: 1. The tenant is of age sufficient to alien his estate by feoffment at the age of fifteen. 2. The estate does not escheat in case of an attainder and execution for felony; their maxim being "the father to the bough, the son to the plough." 3. In most places he had a power of devising lands by will, before the statute for that purpose was made. 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together; which was indeed anciently the most usual *course of descent all over England, though in [*85 particular places particular customs prevailed. These, among other properties, distinguished this tenure in a most remarkable manner: and yet it is said to be only a species of a socage tenure, modified by the custom of the country; the lands being holden by suit of court and fealty, which is a service in its nature certain. Wherefore by a charter of King John, Hubert, Archbishop of Canterbury, was authorized to *exchange* the gavelkind tenures holden of the see of Canterbury into tenures by knight's service; and by statute 31 Hen. VIII. c. 3, for disgaveling the lands of divers lords and gentlemen in the county of Kent, they are directed to be descendible for the future *like other lands which were never holden by service of socage*. Now the immunities which the tenants in gavelkind enjoyed were such, as we cannot conceive should be conferred upon mere ploughmen and peasants; from all of which I think it sufficiently clear that tenures in free socage are in general of a nobler original than is assigned by Littleton, and after him by the bulk of our common lawyers.

Having thus distributed and distinguished the several species of tenure in free socage, I proceed next to show that this also partakes very strongly of the feudal nature. Which may probably arise from its ancient Saxon original; since (as was before observed) feuds were not unknown among the Saxons, though they did not form a part of their military policy, nor were drawn out into such arbitrary consequences as among the Normans. It seems therefore reasonable to imagine, that socage tenure existed in much the same state before the conquest as after; that in Kent it was preserved with a high hand, as our histories inform us it was; and that the rest of the socage tenures dispersed through England escaped the general fate of other property,

partly out of favor and affection to their particular owners, and partly from their own insignificance: since I do not apprehend the number of socage tenures soon after the Conquest to have been very considerable, nor their value by any means large; till *86] by successive *charters of enfranchisement granted to the tenants, which are particularly mentioned by Britton, their number and value began to swell so far, as to be made a distinct, and justly envied, part of our English tenures.

However this may be, the tokens of their feudal original will evidently appear from a short comparison of the incidents and consequences of socage tenure with those of tenure of chivalry; remarking their agreement or difference as we go along.

1. In the first place, then, both were held of superior lords; one of the king, either immediately, or as lord paramount, and (in the latter case) of a subject or mesne lord between the king and his tenant.

2. Both were subject to the feudal return, render, rent, or service of some sort or other, which arose from a supposition of an original grant from the lord to the tenant. In the military tenure, or more proper feud, this was from its nature uncertain; in socage, which was a feud of the improper kind, it was certain, fixed, and determinate (though perhaps nothing more than bare fealty), and so continues to this day.

3. Both were, from their constitution, universally subject (over and above all other renders) to the oath of fealty, or mutual bond of obligation between the lord and tenant. Which oath of fealty usually draws after it suit to the lord's court. And this oath every lord, of whom tenements are holden at this day, may and ought to call upon his tenants to take in his court baron; if it be only for the reason given by Littleton, that if it be neglected, it will by long continuance of time grow out of memory (as doubtless it frequently hath done), whether the land be holden of the lord or not; and so he may lose his seignory, and the profit which may accrue to him by escheats and other contingencies.

4. The tenure in socage was subject, of common right, to aids *87] for knighting the son and marrying the eldest *daughter: which were fixed by the statute of Westm. 1, c. 36, at 20s. for every 20*l.* *per annum* so held; as in knight-service. These aids, as in tenure by chivalry, were originally mere benevolences.

though afterwards claimed as matter of right ; but were all abolished by the statute 12 Car. II.

5. Relief is due upon socage tenure, as well as upon tenure in chivalry ; but the manner of taking it is very different. The relief on a knight's fee was 5*l.*, or one quarter of the supposed value of the land ; but a socage relief is one year's rent or render, payable by the tenant to the lord, be the same either great or small : and therefore Bracton will not allow this to be properly a relief, but *quædam præstatio loco relevii in recognitionem domini*. So too the statute 28 Edw. I. c. 1, declares, that a free sokeman shall give *no relief*, but shall double his rent after the death of his ancestor, according to that which he hath used to pay his lord, and shall not be grieved about measure. Reliefs in knight-service were only payable, if the heir at the death of his ancestor was of full age : but in socage they were due even though the heir was under age, because the lord has no wardship over him. The statute of Charles II. reserves the reliefs incident to socage tenures ; and therefore, wherever lands in fee-simple are holden by a rent, relief is still due of common right upon the death of a tenant.

6. Primer seizin was incident to the king's socage tenants *in capite*, as well as to those by knight-service. But tenancy *in capite* as well as primer seizins are, among the other feudal burdens, entirely abolished by the statute.

7. Wardship is also incident to tenure in socage ; but of a nature very different from that incident to knight-service. For if the inheritance descend to an infant under fourteen, the wardship of him does not, nor ever did, belong to the lord of the fee ; because in this tenure, no military or *other personal service [*88 being required, there was no occasion for the lord to take the profits, in order to provide a proper substitute for his infant tenant ; but his nearest relation (to whom the inheritance cannot descend) shall be his guardian in socage, and have the custody of his land and body till he arrives at the age of fourteen. The guardian must be such a one, to whom the inheritance by no possibility can descend ; as was fully explained, together with the reasons for it, in the former book of these Commentaries. At fourteen this wardship in socage ceases ; and the heir may oust the guardian and call him to account for the rents and profits : for at this age the law supposes him capable of choosing a guardian for himself. It was in this particular, of wardship, as also in

that of marriage, and in the certainty of the render or service, that the socage tenures had so much the advantage of the military ones. But as the wardship ceased at fourteen, there was this disadvantage attending it : that young heirs, being left at so tender an age to choose their own guardians till twenty-one, might make an improvident choice. Therefore, when almost all the lands in the kingdom were turned into socage tenures, the same statute 12 Car. II. c. 24, enacted, that it should be in the power of any father by will to appoint a guardian, till his child should attain the age of twenty-one. And, if no such appointment be made, the court of chancery will frequently interpose, and name a guardian, to prevent an infant heir from improvidently exposing himself to ruin.

8. Marriage, or the *valor maritagii*, was not in socage tenure any perquisite or advantage to the guardian, but rather the reverse. For, if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing for it, unless he married him to advantage. For, the law in favor of infants is always jealous of guardians, and therefore in this case it made them account, not only for what they *did*, but also for what they *89] *might*, receive on the infant's behalf ; *lest by some collusion the guardian should have received the value, and not brought it to account ; but the statute having destroyed all values of marriages, this doctrine of course hath ceased with them. At fourteen years of age the ward might have disposed of himself in marriage, without any consent of his guardian, till the late act for preventing clandestine marriages. These doctrines of wardship and marriage in socage tenures were so diametrically opposite to those in knight-service, and so entirely agree with those parts of King Edward's laws, that were restored by Henry the First's charter, as might alone convince us that socage was of a higher original than the Norman Conquest.

9. Fines for alienation were, I apprehend, due for lands holden of the king *in capite* by socage tenure, as well as in case of tenure by knight-service : for the statutes that relate to this point, and Sir Edward Coke's comment on them, speak generally of all tenants *in capite*, without making any distinction : but now all fines for alienation are demolished by the statute of Charles the Second.

10. Escheats are equally incident to tenure in socage, as

they were to tenure by knight-service ; except only in gavel-kind lands, which are (as is before mentioned) subject to no escheats for felony, though they are to escheats for want of heirs.

Thus much for the two grand species of tenure, under which almost all the free lands of the kingdom were holden till the Restoration in 1660, when the former was abolished and sunk into the latter ; so that the lands of both sorts are now holden *by one universal tenure of free and common socage*.

The other grand division of tenure, mentioned by Bracton as cited in the preceding chapter, is that of *villenage*, as contradistinguished from *liberum tenementum*, or frank tenure. And this (we may remember) he subdivided into two classes, *pure* and *privileged* villenage : from whence have arisen two other species of our modern tenures.

*III. From the tenure of pure villenage have sprung [*90] our present *copyhold* tenures, or tenure by copy of court roll at the will of the lord : in order to obtain a clear idea of which, it will be previously necessary to take a short view of the original and nature of manors.

Manors are in substance as ancient as the Saxon constitution, though perhaps different a little, in some immaterial circumstances, from those that exist at this day ; just as we observed of feuds, that they were partly known to our ancestors, even before the Norman Conquest. A manor, *manerium* a *manendc*, because the usual residence of the owner, seems to have been a district of ground, held by lords or great personages ; who kept in their own hands so much land as was necessary for the use of their families, which were called *terræ dominicales* or *demesne* lands ; being occupied by the lord, or *dominus manerii*, and his servants. The other, or *tenemental* lands, they distributed among their tenants ; which from the different modes of tenure were distinguished by two different names. First, *book-land*, or charter land, which was held by deed under certain rents and free-services, and in effect differed nothing from the free-socage lands ; and from hence have arisen most of the freehold tenants who hold of particular manors, and owe suit and service to the same. The other species was called *folk-land*, which was held by no assurance in writing, but distributed among the common folk or people at the pleasure of the lord, and resumed at his discretion ; being indeed land held in villenage, which we shall

presently describe more at large. The residue of the manor being uncultivated, was termed the lord's waste, and served for public roads, and for common or pasture to the lord and his tenants. Manors were formerly called baronies, as they are still lordships: and each lord or baron was empowered to hold a domestic court, called the court-baron, for redressing misdemeanors and nuisances within the manor; and for settling disputes of property among the tenants. This court is an inseparable *91] ingredient of every manor; and if the number *of suitors should so fail as not to leave sufficient to make a jury or homage, that is, two tenants at least, the manor itself is lost.

In the early times of our legal constitution, the king's greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors to inferior persons to be holden of themselves: which do therefore now continue to be held under a superior lord, who is called in such cases the lord paramount over all these manors; and his seignory is frequently termed an honor, not a manor, especially if it hath belonged to an ancient feudal baron, or hath been at any time in the hands of the crown. In imitation whereof these inferior lords began to carve out and grant to others still more minute estates, to be held as of themselves, and were so proceeding downwards *in infinitum*: till the superior lords observed, that by this method of subinfeudation they lost all their feudal profits of wardships, marriages, and escheats, which fell into the hands of these mesne or middle lords, who were the immediate superiors of the *terre-tenant*, or him who occupied the land: and also that the mesne lords themselves were so impoverished thereby, that they were disabled from performing their services to their own superiors. This occasioned, first, that provision in the thirty-second chapter of *magna charta*, 9 Hen. III. (which is not to be found in the first charter granted by that prince, nor in the great charter of King John) that no man should either give or sell his land, without reserving sufficient to answer the demand of his lord; and afterwards the statute of Westm. 3, or *quia emptores*, 18 Edw. I. c. 1. which directs, that, upon all sales or feoffments of land, the feoffee should hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it. But these provisions, not extending to the king's own tenants *in capite*, the like law concerning them is declared by the statutes of *prerogativa regis*

17 Edw. II. c. 6, and of 34 Edw. III. c. 15, by which last all subinfeudations, previous to the reign of King *Edward I., [*92 were confirmed : but all subsequent to that period were left open to the king's prerogative. And from hence it is clear, that all manors existing at this day, must have existed as early as King Edward the First : for it is essential to a manor, that there be tenants who hold of the lord ; and by the operation of these statutes, no tenant *in capite* since the accession of that prince, and no tenant of a common lord since the statute of *quia emptores*, could create any new tenants to hold of himself.

Now with regard to the folk-land, or estates held in villenage, this was a species of tenure neither strictly feudal, Norman, or Saxon ; but mixed and compounded of them all : and which also, on account of the heriots that usually attend it, may seem to have somewhat Danish in its composition. Under the Saxon government there were, as Sir William Temple speaks, a sort of people in a condition of downright servitude, used and employed in the most servile works, and belonging, both they, their children and effects, to the lord of the soil, like the rest of the cattle or stock upon it. These seem to have been those who held what was called the folk-land, from which they were removable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable, that they who were strangers to any other than a feudal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them, as well as others, to the oath of fealty ; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition. This they called villenage, and the tenants villeins, either from the word *vilis*, or else, as Sir Edward Coke tells us, *a villa* ; because they lived chiefly in villages, and were employed in rustic works of the most sordid kind : resembling the Spartan *helotes*, to whom alone the culture of the lands was consigned ; their rugged masters, like our northern ancestors, esteeming war the only honorable employment of mankind.

*These villeins, belonging principally to lords of manors, [*93 were either villeins *regardant*, that is, annexed to the manor or land : or else they were *in gross*, or at large, that is annexed to the person of the lord and transferable by deed from one owner to another. They could not leave their lord without h's permis-

sion ; but if they ran away, or were purloined from him, might be claimed and recovered by action, like beasts or other chattels. They held indeed small portions of land by way of sustaining themselves and families ; but it was at the mere will of the lord, who might dispossess them whenever he pleased ; and it was upon villein services, that is, to carry out dung, to hedge and ditch the lord's demesnes, and any other the meanest offices : and their services were not only base, but uncertain both as to their time and quantity. A villein, in short, was in much the same state with us, as Lord Molesworth describes to be that of the boors in Denmark, and which Stiernhook attributes also to the *traals* or slaves in Sweden ; which confirms the probability of their being in some degree monuments of the Danish tyranny. A villein could acquire no property either in lands or goods : but, if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use, unless he contrived to dispose of them again before the lord had seized them ; for the lord had then lost his opportunity.

In many places also a fine was payable to the lord, if the villein presumed to marry his daughter to any one without leave from the lord, and, by the common law, the lord might also bring an action against the husband for damages in thus purloining his property. For the children of villeins were also in the same *94] state of bondage with their *parents ; whence they were called in Latin, *nativi*, which gave rise to the female appellation of a villein, who was called a *neife*. In case of a marriage between a freeman and a neife, or a villein and a freewoman, the issue followed the condition of the father, being free if he was free, and villein if he was villein ; contrary to the maxim of the civil law, that *partus sequitur ventrem*. But no bastard could be born a villein, because of another maxim in our law, he is *nullius filius* : and as he can *gain* nothing by inheritance, it were hard that he should *lose* his natural freedom by it. The law however protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord : for he might not kill, or maim his villein ; though he might beat him with impunity, since the villein had no action or remedy at law against his lord, but in case of the murder of his ancestor, or the maim of his own person. Neifes indeed had also an appeal of rape in case the lord violated them by force.

Villeins might be enfranchised by manumission, which is either express or implied: express, as where a man granted to the villein a deed of manumission: implied, as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee, for life or years; for this was dealing with his villein on the footing of a freeman; it was in some of the instances giving him an action against his lord, and in others vesting in him an ownership entirely inconsistent with his former state of bondage. So also if the lord brought an action against his villein, this enfranchised him; for, as the lord might have a short remedy against his villein, by seizing his goods (which was more than equivalent to any damages he could recover), the law which is always ready to catch at any thing in favor of liberty, presumed that by bringing this action he meant to set his villein on the same footing with himself, and therefore held it an implied *manumission. But, in case the lord indicted him for [*95 felony, it was otherwise; for the lord could not inflict a capital punishment on his villein, without calling in the assistance of the law.

Villeins, by these and many other means, in process of time gained considerable ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good, in others, better than their lords. For the good-nature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption, in a regular course of descent, the common law, of which custom is the life, now gave them title to prescribe against their lords; and, on performance of the same service, to hold their lands, in spite of any determination of the lord's will. For though in general they are still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the custom of the manor; which customs are preserved and evidenced by the rolls of the several courts baron in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And, as such tenants had nothing to show for their estates but these customs, and admissions in pursuance of them, entered on those rolls, or the copies of such entries witnessed by the steward, they now began

to be called *tenants by copy of court-roll*, and their tenure itself a *copyhold*.†

* * * * *

In some manors, where the custom has been to permit the heir to succeed the ancestor in his tenure, the estates are styled copyholds of inheritance ; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only : for the custom of the manor has in both cases so far superseded the will of the lord, that, provided the services be performed or stipulated for by fealty, he cannot, in the first instance, refuse to admit the heir of his tenant upon his death, nor, in the second, can he remove his present tenant so long as he lives, though he holds nominally by the precarious tenure of his lord's will.

Thus much for the ancient tenure of *pure villenage*, and the modern one of *copyhold at the will of the lord*, which is lineally descended from it.

IV. There is yet a fourth species of tenure, described by Bracton under the name sometimes of *privileged villenage*, and sometimes of *villein-socage*. This, he tells us, is such as has been *99] held of the kings of England from the Conquest *downwards ; that the tenants herein "*villana faciunt servitia, sed certa et determinata* ;" that they cannot alien or transfer their tenements by grant or feoffment, any more than pure villeins can : but must surrender them to his lord or his steward, to be again granted out, and held in villenage. And from these circumstances we may collect, that what he here describes is no other than an exalted species of copyhold, subsisting at this day, viz., the tenure in *ancient demesne* ; to which, as partaking of the baseness of villenage in the nature of its services, and the freedom of socage in their certainty, he has therefore given a name compounded out of both, and calls it *villanum socagium*.

Ancient demesne consists of those lands or manors, which, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the Confessor, or William the Conqueror ; and so appear to have been by the great survey in the exchequer called domesday-book. The tenants of these lands, under the crown, were not all of the same order or degree. Some of them, as Britton testifies, continued for a long time pure and absolute villeins, dependent

† As to copyholds, see 50 & 51 Vict. c. 73 [1887].

on the will of the lord : and those who have succeeded them in their tenures now differ from common copyholders in only a few points. Others were in a great measure enfranchised by the royal favor : being only bound in respect of their lands to perform some of the better sort of villein-services, but those determinate and certain : as, to plough the king's land for so many days, to supply his court with such a quantity of provisions, or other stated services ; all of which are now changed into pecuniary rents : and in consideration hereof they had many immunities and privileges granted to them ; as to try the right of their property in a peculiar court of their own, called a court of ancient demesne, by a peculiar process, denominated a writ of *right close* ; not to pay toll or taxes ; not to contribute to the expenses of knights of the shire ; not to be put on juries ; and the like.

*These tenants therefore, though their tenure be abso- [*100
lutely copyhold, yet have an *interest* equivalent to a freehold : for notwithstanding their services were of a base and villenous original, yet the tenants were esteemed in all other respects to be highly privileged villeins ; and especially for that their services were fixed and determinate, and that they could not be compelled (like pure villeins) to relinquish these tenements at the lord's will, or to hold them against their own.

* * * * *

Thus have we taken a compendious view of the principal and fundamental points of the doctrine of tenures, both ancient and modern, in which we cannot but remark the mutual connection and dependence that all of them have upon each other. And upon the whole it appears, that whatever changes and alterations these tenures have in process of time undergone, from the Saxon era to 12 Car. II. all lay tenures are now in effect reduced to two species ; *free* tenure in common socage, and *base* tenure by copy of court-roll.

I mentioned *lay* tenures only ; because there is still behind one other species of tenure, reserved by the statute of Charles II., which is of a *spiritual* nature, and called the tenure in frankalmoign.

V. Tenure in *frankalmoign*, in *libera eleemosyna*, or free alms, is that, whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors forever. The service which they were bound to render for these lands was not

certainly defined ; but only in general to pray for the soul of the donor and his heirs, dead or alive ; and therefore, they did no fealty (which is incident to all other services but this), because this divine service was of a higher and more exalted nature. This is the tenure, by which almost all the ancient monasteries and religious houses held their lands ; and by which the parochial clergy, and very many ecclesiastical and eleemosynary foundations, hold them at this day ; the nature of the service being upon the reformation altered, and made conformable to the pure ***102]** doctrines *of the church of England. It was an old Saxon tenure ; and continued under the Norman revolution, through the great respect that was shown to religion and religious men in ancient times. Which is also the reason that tenants in *frankalmoign* were discharged of all other services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions : just as the Druids, among the ancient Britons, had *omnium rerum immunitatem*. And, even at present, this is a tenure of a nature very distinct from all others ; being not in the least feudal, but merely spiritual. For if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden : but merely a complaint to the ordinary or visitor to correct it. Wherein it materially differs from what was called *tenure by divine service* : in which the tenants were obliged to do some special divine services in certain ; as to sing so many masses, to distribute such a sum in alms, and the like ; which, being expressly defined and prescribed, could with no kind of propriety be called *free* alms ; especially as for this, if unperformed, the lord might distrain, without any complaint to the visitor. All such donations are indeed now out of use : for, since the statute of *quia emptores*, 18 Edw. I., none but the king can give lands to be holden by this tenure. So that I only mention them, because *frankalmoign* is excepted by name in the statute of Charles II. and therefore subsists in many instances at this day. Which is all that shall be remarked concerning it : here-with concluding our observations on the nature of tenures.¹

¹ The system of feudal tenures has either been expressly abolished by legislation in this country, or has become practically obsolete, and estates in real property are not held of the grantor by any relation of tenure, or under any of the feudal obligations incident thereto. All lands are allodial, and the entire and absolute property therein is vested in the owners, according

CHAPTER VII.

[BL. COMM.—BOOK II. CH. VII.]

Of Freehold Estates of Inheritance.

THE next objects of our disquisitions are the nature and properties of *estates*. An *estate* in lands, tenements, and hereditaments, signifies such *interest* as the tenant has therein: so that if a man grants all *his estate* in Dale to A and his heirs, every thing that he can possibly grant shall pass thereby.¹ It is called to the nature of their respective estates; so that, as Chancellor Kent says: "By one of those singular revolutions, incident to human affairs, allodial estates, once universal in Europe, and then almost universally exchanged for feudal tenures, have now, after the lapse of many centuries, regained their primitive estimation in the minds of freemen." (Kent's Com. iii. 513.) But it is nevertheless true that many of the fundamental principles of our law of real estate are derived from the feudal system, which it is therefore of essential importance to understand; the nature and connection of the various estates in land which may be created, the modes of their creation, the rights and obligations incident to their acquisition, etc., are, to a large extent, the outgrowth of principles of feudal origin, and the rise and progressive development of real estate law are, therefore, to be traced historically from that early period in which this system constituted the foundation of the structure of society. But even in this country, the owner of land stands in a relation to the State which corresponds, in some degree, to feudal tenure; for whenever the title to land fails, through defect of heirs, the land reverts by escheat to the State, which therefore occupies, so far as the doctrine of reverter is concerned, the position of paramount lord. Each State, in its right of sovereignty, is deemed to possess the original and ultimate property in all the lands included within its jurisdiction. But the doctrine of escheat is not in reality an element of the feudal law which has remained in force, while other parts have become obsolete, but rather a right established in modern jurisprudence, which is similar to the feudal doctrine formerly in force. So the duty of allegiance to the State, and the right of eminent domain, are sometimes said to be of feudal origin; but allegiance does not depend upon the ownership of land, but is obligatory upon every citizen, and eminent domain does not depend upon any form of tenure, but is grounded upon principles of public policy, and results from the sovereignty of the State.

¹ This legal use of the word "estate" must be distinguished from its ordinary popular signification, by which it denotes the extent or amount of a man's real property. Thus when it is said that a man has a large estate, it is commonly meant that his land is of large territorial extent. But in law estate denotes the *interest* which a man has in real property.

in Latin *status* ; it signifying the condition, or circumstance, in which the owner stands in regard to his property. And to ascertain this with proper precision and accuracy, estates may be considered in a threefold view : *first*, with regard to the *quantity of interest* which the tenant has in the tenement: *secondly*, with regard to the *time* at which that quantity of interest is to be enjoyed: and, *thirdly*, with regard to the *number and connections* of the tenants.

First, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by its duration and extent. Thus, either his right or possession is to subsist for an uncertain period, during his own life, or the life of another man : to determine at his own decease, or to remain to his descendants after him : or it is circumscribed within a certain number of years, months, or days: or, lastly, it is infinite and unlimited, being vested in him and his representatives forever. And this occasions the primary division of *estates into such as are *freehold*, and such as are *less than freehold*.

An estate of freehold, *liberum tenementum*, or frank-tenement, is defined by Britton to be “the *possession* of the soil by a free-man.” And St. Germyn tells us, that “the possession of the land is called in the law of England the frank-tenement or freehold.” Such estate, therefore, and no other, as requires actual possession of the land, is, legally speaking, *freehold*: which actual possession can, by the course of the common law, be only given by the ceremony called livery of seizin, which is the same as the feudal investiture. And from these principles we may extract this description of a freehold ; that it is such an estate in lands as is conveyed by livery of seizin, or in tenements of any incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by Littleton, that where a freehold shall pass, it behoveth to have livery of seizin. As, therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seizin, these are properly estates of freehold ; and, as no other estates are conveyed with the same solemnity, therefore no others are properly freehold estates.²

Estates of freehold (thus understood) are either estates of *inheritance*, or estates *not of inheritance*. The former are again

² As to the nature of the ancient ceremony, livery of seizin, see page 461

divided into inheritances *absolute* or fee-simple ; and inheritances *limited*, one species of which we usually call fee-tail.

I. Tenant in fee-simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs for ever : generally, absolutely, and simply ; without mentioning *what* heirs, but referring that to his own pleasure, or to the disposition of the law. The true meaning of the word fee (*feodum*) is the same with that of feud or fief, and in its original sense it is *taken in contradistinction to *allodium* ; which latter the writers on this subject define to be every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree ; and the owner thereof hath *absolutum et directum dominium*, and therefore is said to be seized thereof absolutely *in dominico suo*, in his own demesne. But *feodum*, or fee, is that which is held of some superior, on condition of rendering him service ; in which superior the ultimate property of the land resides. And therefore Sir Henry Spelman defines a feud or fee to be the right which the vassal or tenant hath in lands, to *use* the same, and to take the profits thereof to him and his heirs, rendering to the lord his due services : the mere allodial *property* of the soil always remaining in the lord. This allodial property no subject in England has ; it being a received, and now undeniable, principle in the law, that all the lands in England are holden mediately or immediately of the king. The king therefore only hath *absolutum et directum dominium* : but all subjects' lands are in the nature of *feodum* or fee ; whether derived to them by descent from their ancestors, or purchased for a valuable consideration : for they cannot come to any man by either of those ways, unless accompanied with those feudal clogs which were laid upon the first feudatory when it was originally granted. A subject therefore hath only the usufruct, and not the absolute property of the soil ; or, as Sir Edward Coke expresses it, he hath *dominium utile*, but not *dominium directum*. And hence it is, that, in the most solemn acts of law, we express the strongest and highest estate that any subject can have, by these words : " he is seized thereof *in his demesne, as of fee*." It is a man's demesne, *dominicum*, or property, since it belongs to him and his heirs for ever : yet this *dominicum*, property, or demesne, is strictly not absolute or

allodial, but qualified or feudal: it is his demesne, *as of fee*; that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

***106]** *This is the primary sense and acceptation of the word *fee*. But (as Sir Martin Wright very justly observes) the doctrine, "that all lands are holden," having been so for many ages a fixed and undeniable axiom, our English lawyers do very rarely (of late years especially) use the word *fee* in this its primary original sense, in contradistinction to *allodium* or absolute property, with which they have no concern; but generally use it to express the continuance or quantity of estate. A *fee*, therefore, in general, signifies an estate of inheritance; being the highest and most extensive interest that a man can have in a feud: and when the term is used simply, without any other adjunct, or has the adjunct of *simple* annexed to it (as a fee, or a fee-simple), it is used in contradistinction to a fee conditional at the common law, or a fee-tail by the statute; importing an absolute inheritance, clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general whether male or female, lineal or collateral. And in no other sense than this is the king said to be seized in fee, he being the feudatory of no man.

Taking therefore *fee* for the future, unless where otherwise explained, in this its secondary sense, as an estate of inheritance, it is applicable to, and may be had in, any kind of hereditaments either corporeal or incorporeal. But there is this distinction between the two species of hereditaments: that, of a corporeal inheritance a man shall be said to be seized *in his demesne, as of fee*; of an incorporeal one, he shall only be said to be seized *as of fee*, and not in his demesne. For, as incorporeal hereditaments are in their nature collateral to, and issue out of, lands and houses, their owner hath no property, *dominium*, or demesne, in the *thing* itself, but hath only something derived out of it; resembling the *servitudes*, or services, of the civil law.

***107]** The *dominium* or property is frequently *in one man, while the appendage or service is in another. Thus Caius may be seized *as of fee* of a way leading over the land, of which Titius is seized *in his demesne as of fee*.

The fee-simple or inheritance of lands and tenements is generally vested and resides in some person or other; though

divers inferior estates may be carved out of it. As if one grants a lease for twenty-one years, or for one or two lives, the fee-simple remains vested in him and his heirs; and after the determination of those years or lives, the land reverts to the grantor or his heirs, who shall hold it again in fee-simple. Yet sometimes the fee may be in *abeyance*, that is (as the word signifies), in expectation, remembrance, and contemplation in law; there being no person in *esse*, in whom it can vest and abide: though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est hæres viventis*: it remains therefore in waiting or abeyance, during the life of Richard.³ This is likewise always the case of a parson of a church, who hath only an estate therein for the term of his life; and the inheritance remains in abeyance. And not only the fee, but the freehold also, may be in abeyance; as, when a parson dies, the freehold of his glebe is in abeyance, until a successor be named, and then it vests in the successor.

The word "heirs" is necessary in the grant or donation, in order to make a fee, or inheritance. For if land be given to a man for ever, or to him and his assigns for ever, this vests in him but an estate for life.⁴ This very great nicety, about the insertion of the word "heirs," in all feoffments and grants, in order

³ This estate limited to the heirs of Richard is what is known as a contingent remainder, (a subject to be hereafter considered.) The ancient doctrine that the seizin was in abeyance in such a case is not now maintained, but the more reasonable view is taken that the inheritance remains in the grantor until some person arises by the death of Richard answering the description given, and so capable of taking under the grant.

So, in the other instances mentioned, the doctrine of abeyance is now discarded. (See *Wallach v. Van Renswick*, 92 U. S. 202.)

⁴ In England and in many American States, the rule, requiring the use of the word "heirs," in a conveyance by deed, has been changed by statute. Thus, in New York, it is declared that every grant or devise of real estate, or any interest therein, shall pass all the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of such grant. (1 Rev. St. 748.) But wherever statutes of this kind have not been enacted the common law still remains in force; and in all the States the general practice is to use the word "heirs," whether required or not.

to vest a fee, is plainly a relic of the feudal strictness ; by which *108] we may remember it was required *that the form of the donation should be punctually pursued ; or that, as Cragg expresses it in the words of Baldus, "*donationes sint stricti juris, ne quis plus donasse præsumatur quam in donatione expresserit.*" And therefore, as the personal abilities of a donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life ; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs. But this rule is now softened by many exceptions.

For, 1. It does not extend to devises by will ; in which, as they were introduced at the time when the feudal rigor was apace wearing out, a more liberal construction is allowed ; and therefore by a devise to a man for ever, or to one and his assigns for ever, or to one in fee-simple, the devisee, hath an estate of inheritance ; for the intention of the devisor is sufficiently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance. But if the devise be to a man and his assigns, without annexing words of perpetuity, there the devisee shall take only an estate for life ; for it does not appear that the devisor intended any more.⁶ 2. Neither does this rule extend to fines or recoveries considered as a species of conveyance ;⁶ for thereby an estate in fee passes by act and operation of law without the word heirs," as it does also, for particular reasons, by certain other methods of conveyance, which have relation to a former grant or estate, wherein the word "heirs" was expressed. 3. In creations of nobility by writ, the peer so created hath an inheritance in his title, without expressing the word "heirs ;" for heirship is implied in the creation, unless it be otherwise specially provided : but in creations by patent, which are *stricti juris*, the word "heirs" must be inserted, otherwise there is no inheritance. 4. In grants of lands to sole corporations

⁶ A recent English statute provides that a conveyance shall pass all the right, title, and interest of the grantor in the property conveyed, so far as a contrary intention is not expressed. (44 & 45 Vict. c. 41, s. 63.) A like statute as to wills was enacted in 1837. Similar statutes have been passed in a number of the American States. (See last note.)

⁶ In regard to "fines" and "recoveries," see pages 486-498.

and their successors, the word "successors" supplies the place of "heirs;" for as heirs take from the ancestor, so doth the successor from the predecessor. Nay, in *a grant to a bishop [*109 or other sole spiritual corporation, in *frankalmoign*; the word "*frankalmoign*" supplies the place of "successors" (as the word "successors" supplies the place of "heirs") *ex vi termini*; and in all these cases a fee-simple vests in such sole corporation. But, in a grant of lands to a corporation aggregate, the word "successors" is not necessary, though usually inserted; for, albeit such simple grant be strictly only an estate for life, yet as that corporation never dies, such estate for life is perpetual or equivalent to a fee simple, and therefore the law allows it to be one. 5. Lastly, in the case of the king, a fee-simple will vest in him, without the word "heirs" or "successors" in the grant; partly from prerogative royal, and partly from a reason similar to the last, because the king in judgment of law never dies. But the general rule is, that the word "heirs" is necessary to create an estate of inheritance.⁷

II. We are next to consider limited fees, or such estates of inheritance as are clogged and confined with conditions, or qualifications of any sort. And these we may divide into two sorts: 1. *Qualified*, or *base* fees; and, 2. Fees *conditional*, so called at the common law; and afterwards fees-tail, in consequence of the statute *de donis*.

⁷ In a conveyance of an estate in fee-simple, no provision prohibiting the free transfer or alienation of the property by the grantee, will be of any validity. The power of disposition is inseparably connected with such estates. But if the restriction be only in regard to transfer to a particular person, or for a certain limited time, it may be valid. So conditions restricting the use of the premises to a certain extent, may be valid; as, by prohibiting the erection of buildings of a particular kind, or the creation or allowance of nuisances upon the premises. Thus, conditions that a school-house should not be erected upon the premises, or a distillery, or a blast-furnace, or a livery-stable, or a machine-shop, or a powder magazine, or a hospital, have been held to be valid restrictions. (See *Plumb v. Tubbs*, 41 N. Y. 442, and cases cited; also 100 U. S. 55; 6 N. Y. 467; 47 N. H. 396; 29 Mich. 78.)

Originally, at common law, lands owned in fee-simple could not be applied to the payment of the owner's debts. But this power was given in England by an early statute (13 Edw. I. c. 18); and in this country it is now a universally established rule, that the lands of the owner may be taken for the payment of his debts, either during his life or after his decease. Personal property, however, is first devoted to this purpose, and the realty afterwards. There are statutes on this subject in the several States. (See *post*, page 817.)

1. A base, or qualified fee, is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As in the case of a grant to A. and his heirs, *tenants of the manor of Dale*; in this instance, whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. So when Henry VI. granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of Barons of Lisle; here John Talbot had a base or qualified fee in that dignity, and, the instant he or his heirs quitted the seignory of this manor, the dignity was *110] at an end. This *estate is a fee, because by possibility it may endure for ever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee.⁸

⁸ These "base," "qualified," or "determinable" fees, as they are called, assume various forms. Thus, there may be a *fee upon condition*, as if an estate be given to A and his heirs, provided that he shall erect a warehouse upon the premises within a certain time. If the condition is not complied with, the grantor or his heirs may re-enter or (what is now usually the equivalent practice) bring an action of ejectment to recover possession. If this is not done, A's estate will continue. (See *Nicoll v. Erie R. R. Co.*, 12 N. Y. 121.) Secondly, there may be a *fee upon limitation*, as if an estate be given to A and his heirs until B returns from Rome. If, in such a case, B ever returns from Rome, A's estate is at once defeated, no re-entry or action being necessary to recover possession. But if B never returns, the estate in A and his heirs becomes absolute. Conditions are created by hypothetical or conditional expressions, or words in the nature of a proviso; limitations by words of time, as *until*, *as long as*, *during*, etc. "Where an estate is so expressly limited by the words of its creation, that it cannot endure for any longer time than until the contingency happens upon which the estate is to fail, this is a limitation. On the other hand, when an estate is expressly granted upon condition in deed, the law permits it to endure beyond the time of the contingency happening, unless the grantor takes advantage of the breach of condition by making entry, etc." (Crabb on Real Property, § 2135.) Thirdly, there may be an estate upon *conditional limitation*, which partakes of the characteristics of both the other classes of qualified fees. An illustration would be an estate given to A and his heirs, but if B returns from Rome, then to C and his heirs. If, in such a case, B should return from Rome, the estate would at once pass to C without any re-entry. Estates upon conditional limitation did not exist at common law, since, by its rules, a fee could not be limited after a fee, but were introduced afterwards, as one of the results of the doctrine of uses, to be hereafter considered. (See *Church Proprietors v. Grant*, 3 Gray, 142, 147; also 14 Gray, 586, 612; 16 Me. 158; 18 N. Y. 96.)

2. A conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others: "*donatio stricta et coarctata; sicut certis hæredibus, quibusdam a successione exclusis;*" as to the heirs of a man's body, by which only his lineal descendants were admitted, in exclusion of collateral heirs; or to the heirs *male of his body*, in exclusion both of collaterals, and lineal females also. It was called a conditional fee, by reason of the condition expressed or implied in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants, whatsoever; that, on failure of the heirs specified in the grant, the grant should be at an end, and the land return to its ancient proprietor. Such conditional fees were strictly agreeable to the nature of feuds, when they first ceased to be mere estates for life, and were not yet arrived to be absolute estates in fee-simple. And we find strong traces of these limited, conditional fees, which could not be alienated from the lineage of the first purchaser in our earliest Saxon laws.

Now, with regard to the condition annexed to these fees by the common law, our ancestors held, that such a gift (to a man and the heirs of his body) was a gift upon condition, that it should revert to the donor if the donee had no heirs of his body; but, if he had, it should then remain to the donee. They therefore called it a fee-simple, on condition that he had issue. Now we must observe, that, when any condition is performed, it is thenceforth entirely gone; and the thing to which it was before annexed, becomes absolute, * and wholly unconditional. So that, as [*111 soon as the grantee had any issue born, his estate was supposed to become absolute, by the performance of the condition; at least, for these three purposes: 1. To enable the tenant to alien the land, and thereby to bar not only his own issue, but also the donor of his interest in the reversion. 2. To subject him to forfeit it for treason; which he could not do, till issue born, longer than for his own life; lest thereby the inheritance of the issue, and reversion of the donor, might have been defeated. 3. To empower him to charge the land with rents, commons, and certain other incumbrances, so as to bind his issue. And this was thought the more reasonable, because, by the birth of issue, the possibility of the donor's reversion was rendered more distant and precarious: and *his* interest seems to have been the only

one which the law, as it then stood, was solicitous to protect; without much regard to the right of succession intended to be vested in the issue. However, if the tenant did not in fact alien the land, the course of descent was not altered by this performance of the condition; for if the issue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation; the land, by the terms of the donation, could descend to none but the heirs *of his body*, and therefore, in default of them, must have reverted to the donor. For which reason, in order to subject the lands to the ordinary course of descent, the donees of these conditional fee-simples took care to alien as soon as they had performed the condition by having issue; and afterwards repurchased the lands, which gave them a fee-simple absolute, that would descend to the heirs-general, according to the course of the common law. And thus stood the old law with regard to conditional fees: which things, says Sir Edward Coke, though they seem ancient, are yet necessary to be known; as well for the declaring how the common law stood in such cases, as for the sake of annuities, and such like inheritances, as are not within the statutes of entail, and therefore remain as at the common law.

*112] *The inconveniences which attended these limited and fettered inheritances, were probably what induced the judges to give way to this subtle finesse of construction (for such it undoubtedly was), in order to shorten the duration of these conditional estates. But, on the other hand, the nobility, who were willing to perpetuate their possessions in their own families, to put a stop to this practice, procured the statute of Westminster the second (commonly called the statute *de donis conditionalibus*) to be made; which paid a greater regard to the private will and intentions of the donor, than to the propriety of such intentions, or any public considerations whatsoever. This statute revived in some sort the ancient feudal restraints which were originally laid on alienations, by enacting, that from thenceforth the will of the donor be observed; and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any; or, if none, should revert to the donor.

Upon the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee-simple,

which became absolute and at his own disposal, the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a *fee-tail*; and investing in the donor the ultimate fee-simple of the land, expectant on the failure of issue; which expectant estate is what we now call a reversion. And hence it is that Littleton tells us, that tenant in fee-tail is by virtue of the statute of Westminster the second.

Having thus shown the *original* of estates-tail, I now proceed to consider, *what things* may, or may not, be entailed *under [*113 the statute *de donis*. *Tenements* is the only word used in the statute: and this Sir Edward Coke expounds to comprehend all corporeal hereditaments whatsoever; and also all incorporeal hereditaments which savor of the realty, that is, which issue out of corporeal ones, or which concern, or are annexed to, or may be exercised within the same; as, rents, estovers, commons, and the like. Also offices and dignities, which concern lands, or have relation to fixed and certain places, may be entailed. But mere personal chattels, which savor not at all of the realty, cannot be entailed. Neither can an office, which merely relates to such personal chattels; nor an annuity, which charges only the person, and not the lands of the grantor. But in these last, if granted to a man and the heirs of his body, the grantee hath still a fee-conditional at common law, as before the statute; and by his alienation (after issue born) may bar the heir or reversioner. An estate to a man and his heirs for another's life cannot be entailed: for this is strictly no estate of inheritance (as will appear hereafter), and therefore not within the statute *de donis*. Neither can a copyhold estate be entailed by virtue of the statute; for that would tend to encroach upon and restrain the will of the lord: but, by the *special custom* of the manor, a copyhold may be limited to the heirs of the body; for here the custom ascertains and interprets the lord's will.

Next, as to the several *species* of estates-tail, and how they are respectively created. Estates-tail are either *general* or *special*. Tail-general is where lands and tenements are given to one, and the *heirs of his body begotten*: which is called tail-general, because, how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate-tail, *per formam doni*. Ten-

ant in tail special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. *114] And this may happen several ways. I shall instance in only one ; as where lands and tenements are given to a man and the *heirs of his body, on Mary his now wife to be begotten* : here no issue can inherit, but such special issue as is engendered between them two ; not such as the husband may have by another wife ; and therefore it is called special tail. And here we may observe, that the words of inheritance (to him and his *heirs*) give him an estate in fee : but they being heirs *to be by him begotten*, this makes it a fee-tail ; and the person being also limited, on whom such heirs shall be begotten (viz. *Mary his present wife*), this makes it a fee-tail special.

Estates, in general and special tail, are farther diversified by the distinction of sexes in such entails ; for both of them may either be in tail *male* or tail *female*. As if lands be given to a man, and his *heirs male of his body begotten*, this is an estate in tail male general ; but if to a man and the heirs *female of his body on his present wife begotten*, this is an estate in tail female special. And, in case of an entail male, the heirs female shall never inherit, nor any derived from them ; nor, *e converso*, the heirs male, in case of a gift in tail female. Thus, if the donee in tail male hath a daughter, who dies leaving a son, such grandson, in this case cannot inherit the estate-tail ; for he cannot deduce his descent wholly by heirs male. And as the heir male must convey his descent wholly by males, so must the heir female wholly by females. And therefore if a man hath two estates-tail, the one in tail male, the other in tail female ; and he hath issue a daughter, which daughter hath issue a son ; this grandson can succeed to neither of the estates ; for he cannot convey his descent wholly either in the male or female line.

As the word *heirs* is necessary to create a fee, so in farther limitation of the strictness of the feudal donation, the word *body*, or some other words of procreation, are necessary to make it a *115] fee-tail, and ascertain to what heirs in particular the fee is limited. If, therefore, either the words of inheritance, or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his *issue of his body*, to a man and his *seed*, to a man and his *children*, or *offspring* ; all these are only estates for life,

there wanting the words of inheritance, his heirs. So, on the other hand, a gift to a man, and his *heirs male* or *female*, is an estate in fee-simple, and not in fee-tail: for there are no words to ascertain the body out of which they shall issue. Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate-tail may be created by a devise to a man and his *seed*, or to a man and his *heirs male*; or by other irregular modes of expression.

There is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates in *libero maritaggio*, or *frank-marriage*. These are defined to be, where tenements are given by one man to another, together with a wife, who is the daughter or cousin of the donor, to hold in frank-marriage. Now, by such gift, though nothing but the word *frank-marriage* is expressed, the donees shall have the tenements to them, and the heirs of their two bodies begotten; that is, they are tenants in special tail. For this one word, *frank-marriage*, does *ex vi termini* not only create an inheritance, like the word *frankalmoign*, but likewise limits that inheritance; supplying not only words of descent, but of procreation also. Such donees in frank-marriage are liable to no service but fealty; for a rent reserved thereon is void, until the fourth degree of consanguinity be past between the issues of the donor and donee.

The *incidents* to a tenancy in tail, under the statute Westm. 2, are chiefly these: 1. That a tenant in tail may commit *waste* on the estate-tail, by felling timber, pulling down houses, or the like, without being impeached, or called to account for the same. *2. That the wife of the tenant in tail shall have her [*116 *dower*, or thirds, of the estate-tail. 3. That the husband of a female tenant in tail may be tenant by the *curtesy* of the estate-tail. 4. That an estate-tail may be *barred*, or destroyed by a fine, by a common recovery, or by lineal warranty descending with assets to the heir. All which will hereafter be explained at large.

Thus much for the nature of estate-tail: the establishment of which family law (as it is properly styled by Pigott) occasioned infinite difficulties and disputes. Children grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then under color of long leases the issue

might have been virtually disinherited; creditors were defrauded of their debts; for, if a tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth: innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our ancient books are full: and treasons were encouraged; as estates-tail were not liable to forfeiture, longer than for the tenant's life. So that they were justly branded, as the source of new contentions, and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm. But as the nobility were always fond of this statute, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature, and therefore, by the contrivance of an active and politic prince, a method was devised to evade it.

About two hundred years intervened between the making of the statute *de donis*, and the application of common recoveries to this intent, in the twelfth year of Edward IV.; which were *117] then openly declared by the judges to be a *sufficient bar of an estate-tail. For though the courts had, so long before as the reign of Edward III. very frequently hinted their opinion that a bar might be effected upon these principles, yet it was never carried into execution; till Edward IV. observing (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had on families, whose estates were protected by the sanctuary of entails, gave his countenance to this proceeding, and suffered Taltarum's case to be brought before the court: wherein, in consequence of the principles then laid down, it was in effect determined, that a common recovery suffered by tenant in tail should be an effectual destruction thereof. What common recoveries are, both in their nature and consequences, and why they are allowed to be a bar to the estate-tail, must be reserved to a subsequent inquiry. At present I shall only say, that they are fictitious proceedings, introduced by a kind of *pia fraus*, to elude the statute *de donis*, which was found so intolerably mischievous, and which yet one branch of the legislature would not then consent to repeal: and that these recoveries, however clandestinely introduced, are now become by long use and acquiescence a most common assurance of

lands; and are looked upon as the legal mode of conveyance, by which tenant in tail may dispose of his lands and tenements: so that no court will suffer them to be shaken or reflected on, and even acts of parliament have by a sidewind countenanced and established them.

This expedient having greatly abridged estates-tail with regard to their duration, others were soon invented to strip them of other privileges. The next that was attacked was their freedom from forfeitures for treason. For, notwithstanding the large advances made by recoveries, in the compass of about threescore years, towards unfettering these inheritances, and thereby subjecting the lands to forfeiture, the rapacious prince then reigning, finding them frequently *resettled in a [*118 similar manner to suit the convenience of families, had address enough to procure a statute, whereby all estates of inheritance (under which general words estates-tail were covertly included) are declared to be forfeited to the king upon any conviction of high treason.

The next attack which they suffered in order of time, was by the statute 32 Hen. VIII. c. 28, whereby certain leases made by tenants in tail, which do not tend to the prejudice of the issue, were allowed to be good in law, and to bind the issue in tail. But they received a more violent blow, in the same session of parliament, by the construction put upon the statute of fines, by the statute 32 Hen. VIII. c. 36, which declares a fine duly levied by tenant in tail to be a complete bar to him and his heirs, and all other persons claiming under such entail. This was evidently agreeable to the intention of Henry VII. whose policy it was (before common recoveries had obtained their full strength and authority) to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of his nobles. But as they, from the opposite reasons, were not easily brought to consent to such a provision, it was therefore couched, in his act, under covert and obscure expressions. And the judges, though willing to construe that statute as favorably as possible for the defeating of entailed estates, yet hesitated at giving fines so extensive a power by mere implication, when the statute *de donis* had expressly declared, that they would *not* be a bar to estates-tail. But the statute of Hen. VIII., when the doctrine of alienation was better received, and the will of the

prince more implicitly obeyed than before, avowed and established that intention. Yet, in order to preserve the property of the crown from any danger of infringement, all estates-tail created by the crown and of which the crown has the reversion, are excepted out of this statute. And the same was done with regard to common recoveries, by the statute 34 & 35 Hen. VIII. c. 20, which enacts, that no feigned recovery had against tenants *119] in tail, where the estate was created by the *crown, and the remainder or reversion continues still in the crown, shall be of any force and effect. Which is allowing, indirectly and collaterally, their full force and effect with respect to ordinary estates-tail, where the royal prerogative is not concerned.

Lastly, by a statute of the succeeding year, all estates-tail are rendered liable to be charged for payment of debts due to the king by record or special contract; as since, by the bankrupt laws, they are also subjected to be sold for the debts contracted by a bankrupt. And, by the construction put on the statute 43 Eliz. c. 4, an appointment by tenant in tail of the lands entailed, to a charitable use, is good without fine or recovery.

Estates-tail, being thus by degrees unfettered, are now reduced again to almost the same state, even before issue born, as conditional fees were in at common law, after the condition was performed, by the birth of issue. For, first, the tenant in tail is now enabled to alien his lands and tenements, by fine, by recovery, or by certain other means; and thereby to defeat the interest as well of his own issue, though unborn, as also of the reversioner, except in the case of the crown: secondly, he is now liable to forfeit them for high treason: and lastly, he may charge them with reasonable leases, and also with such of his debts as are due to the crown on specialties, or have been contracted with his fellow-subjects in a course of extensive commerce.⁹

⁹ The former modes of barring an estate-tail by fine and recovery, have been abolished in England, and provision is now made by statute for accomplishing the same end, by deed executed by the tenant in tail, and enrolled in chancery within six months after its execution. (3 & 4 Will. IV., ch. 74.) Estates-tail were introduced into the American colonies from England, but at the present day they have either been changed by statute into estates in fee-simple, or may be changed into fees-simple by ordinary words of conveyance. The statutes of the several States contain special provisions in regard to this subject. (See *Washburn on Real Property*, vol. i. p. 118, 5th Ed.)

CHAPTER VIII.

[BL. COMM.—BOOK II. CH. VIII.]

Of Freeholds, not of Inheritance.

WE are next to discourse of such estates of freehold, as are not of inheritance, but *for life* only. And of these estates for life, some are *conventional*, or expressly created by the act of the parties; others merely *legal*, or created by construction and operation of law. We will consider them both in their order.

1. Estates for life, expressly created by deed or grant (which alone are properly conventional), are where a lease is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one: in any of which cases he is styled tenant for life; only when he holds the estate by the life of another, he is usually called tenant *per auter vie*. These estates for life are, like inheritances, of feudal nature; and were, for some time, the highest estate that any man could have in a feud, which (as we have before seen) was not in its original hereditary. They are given or conferred by the same feudal rites and solemnities, the same investiture or livery of seizin, as fees themselves are; and they are held by fealty, if demanded, and such conventional rents and services as the lord or lessor, and his tenant or lessee, have agreed on.

*Estates for life may be created, not only by the express [*121 words before mentioned, but also by a general grant, without defining or limiting any specific estate. As, if one grants to A B the manor of Dale, this makes him tenant for life. For though, as there are no words of inheritance or *heirs*, mentioned in the grant, it cannot be construed to be a fee, it shall however be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or a grant for a term of life generally, shall be construed to be an estate for the life *of the grantee*; in case the grantor hath authority to make such grant: for an estate for a man's own life is more beneficial and of a higher nature than for any other life:

and the rule of law is, that all grants are to be taken most strongly against the grantor, unless in the case of the king.

Such estates for life will, generally speaking, endure as long as the life for which they are granted: but there are some estates for life which may determine upon future contingencies, before the life for which they are created expires. As if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. And moreover, in case an estate be granted to a man for his life, generally, it may also determine by his *civil* death: as if he enters into a monastery, whereby he is dead in law: for which reason in conveyances the grant is usually made "for the term of a man's *natural* life;" which can only determine by his *natural* death.

***122]** *The *incidents* to an estate for life are principally the following; which are applicable not only to that species of tenants for life which are expressly created by deed; but also to those which are created by act and operation of law.

I. Every tenant for life, unless restrained by covenant or agreement, may of common right take upon the land demised to him reasonable *estovers* or *botes*. For he hath a right to the full enjoyment and use of the land, and all its profits, during his estate therein. But he is not permitted to cut down timber, or to do other waste upon the premises: for the destruction of such things as are not the temporary profits of the tenement, is not necessary for the tenant's complete enjoyment of his estate; but tends to the permanent and lasting loss of the person entitled to the inheritance.¹

¹ The life tenant may, however, continue the working of old mines, and make new shafts or pits in mines already open, in order to pursue the same vein of minerals. Waste is a spoil or destruction of that which constitutes the corporeal hereditament, and is, in a legal point of view, both actual (usually called *voluntary* waste), such as that mentioned in the text, and *permissive*, as where houses are allowed to fall into ruin, or go to decay.

The remedies at common law for the commission of waste, were "an

2. Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such a determination is contingent and uncertain. Therefore if a tenant for his own life sows the lands and dies before harvest, his executors shall have the *emblems* or profits of the crop: for the estate was determined by the *act of God*, and it is a maxim in the law, that *actus Dei nemini facit injuriam*. The representatives, therefore, of the tenant for life shall have the emblems to compensate for the labor and expense of tilling, manuring, and sowing the lands; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it. Wherefore by the feudal law, if a tenant for life died between the beginning of September and the end of February, the lord, who was entitled to the reversion, was also entitled to the profits of the whole year; but if he died between the beginning of March and the end *of August, the [*123 heirs of the tenant received the whole. From hence our law of emblems seems to have been derived, but with very considerable improvements. So it is also, if a man be tenant for the life of another and *cestui que vie*, or he on whose life the land is held, dies after the corn sown, the tenant *per auter vie* shall have the emblems. The same is also the rule, if a life estate be determined by the *act of law*. Therefore if a lease be made to hus-

action of waste" to recover the place wasted and treble damages (now generally obsolete or abolished), and an "action on the case in the nature of waste," to recover damages for the injuries caused to the property. An injunction in equity may also be procured to interdict the commission of waste. So if timber is cut down, the reversioner is entitled to recover its value, if it is carried away or sold.

It is sometimes the practice in creating life estates, to provide that they shall be held "without impeachment of waste." The effect of this is to give the tenant for life very enlarged powers as to doing acts in the nature of waste. Still his power in this respect is not even then equal to that which a tenant in fee-simple possesses; because courts of equity have established the doctrine that he may not commit any act which tends to the destruction of the thing settled; as, for instance, the pulling down of a family mansion, or even cutting any timber which has been planted or left standing for ornament. And it may be remarked that no question of taste is allowed to influence the decision, whether or not the trees are ornamental; the only point to be ascertained is, whether they were in fact planted or left standing for ornament (Broom and H. Comm. ii. 235, 236; see *post*, page 431.)

band and wife during coverture (which gives them a determinable estate for life), and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii*, the husband shall have the emblements in this case ; for the sentence of divorce is the act of law. But if an estate for life be determined by the tenant's *own act* (as, by forfeiture for waste committed ; or, if a tenant during widowhood thinks proper to marry), in these, and similar cases, the tenants, having thus determined the estate by their own acts, shall not be entitled to take the emblements. The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit, but it is otherwise of fruit-trees, grass, and the like ; which are not planted annually at the expense and labor of the tenant, but are either a permanent or natural profit of the earth. For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit ; but merely with a prospect of its being useful to himself in future and to future successions of tenants. The advantages also of emblements are particularly extended to the parochial clergy by the statute 28 Hen. VIII. c. 11. For all persons, who are presented to any ecclesiastical benefice, or to any civil office, are considered as tenants for their own lives, unless the contrary be expressed in the form of donation.

3. A third incident to estates for life relates to the under-tenants, or lessees. For they have the same, nay greater indulgences than the lessors, the original tenants for life. The same ; *124] for the law of estovers and emblements *with regard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place : and greater ; for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. As in the case of a woman who holds *durante viduitate* ; her taking husband is her own act, and therefore deprives her of the emblements ; but if she leases her estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger, and could not prevent her. The lessees of tenants for life had also at the common law another most unreasonable advantage ; for at the death of their lessors, the tenants for life, these under-tenants might if they pleased quit the premises, and pay no rent to anybody for the

occupation of the land since the last quarter-day, or other day assigned for payment of rent. To remedy which it is now enacted, that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a ratable proportion of rent from the last day of payment to the death of such lessor.²

II. The next estate for life is of the legal kind, as contradistinguished from conventional; viz. that of tenant *in tail after possibility of issue extinct*. This happens where one is tenant in special tail; and a person, from whose body the issue was to spring, dies without issue; or, having left issue, that issue becomes extinct: in either of these cases the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct. As where one has an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue: in this case the man has an estate-tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate. For if it had called him barely *tenant in fee-tail special*, that *would not have distinguished him from others; [*125 and besides, he has no longer an estate of inheritance or fee, for he can have no heirs capable of taking *per formam doni*. Had it called him *tenant in tail without issue*, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been styled *tenant in tail without possibility of issue*, this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition therefore could so exactly mark him out, as this of *tenant in tail after possibility of issue extinct*, which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail, which he once had, but also states that this possibility is now extinguished and gone.

² Similar statutes have been passed in a number of the United States, or the same doctrine has been practically enforced by the courts.

A tenant for life could not, by the common law, make a valid lease of the land, to last beyond his own life. It therefore became the practice, after a time, to give him a power in the conveyance made to him, to make a lease for a limited period of years, which should continue even after his death. And now, by statute in England, it is provided that, under certain restrictions, a tenant for life may make a valid lease to last for 21 years. Similar statutes are found in various States of this country.

This estate must be created by the act of God, that is by the death of that person out of whose body the issue was to spring; for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii*, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them. A possibility of issue is always supposed to exist, in law, unless extinguished by the death of the parties; even though the donees be each of them an hundred years old.

This estate is of an amphibious nature, partaking partly of an estate-tail, and partly of an estate for life. The tenant is, in truth, only tenant for life, but with many of the privileges of a tenant in tail; as not to be punishable for waste, &c.; or, he is tenant in tail, with many of the restrictions of a tenant for life; as to forfeit his estate, if he aliens it in fee-simple: whereas such alienation by tenant in tail, though voidable by the issue, is no forfeiture of the estate to the reversioner; who is not concerned in interest, *till all possibility of issue be extinct. But, in general, the law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life, which exchange can only be made, as we shall see hereafter, of estates that are equal in their nature.

III. Tenant by the curtesy of England, is where a man marries a woman seized of an estate of inheritance, that is, of lands and tenements in fee-simple or fee-tail; and has by her issue, born alive, which was capable of inheriting her estate. In this case, he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England.

This estate, according to Littleton, has its denomination, because it is used within the realm of England only; and it is said in the Mirrour to have been introduced by King Henry the First; but it appears also to have been the established law of Scotland. wherein it was called *curialitas*, so that probably our word *curtesy* was understood to signify rather an attendance upon the lord's court or *curtis* (that is, being his vassal or tenant), than to denote any peculiar favor belonging to this island. And therefore it is laid down that by having issue, the husband shall be entitled to do homage to the lord, for the wife's lands, alone:

whereas, before issue had, they must both have done it together. It is likewise used in Ireland, by virtue of an ordinance of King Henry III. It also appears to have obtained in Normandy ; and was likewise used among the ancient Almaines or Germans. And yet it is not generally apprehended to have been a consequence of feudal tenure, though I think some substantial feudal reasons may be given for its introduction. For if a woman seized of lands hath issue by her husband, and dies, the husband is the natural guardian of the child, and as such is in reason entitled to *the profits of the lands in order to maintain it ; for [*127 which reason the heir apparent of a tenant by the curtesy could not be in ward to the lord of the fee, during the life of such tenant. As soon therefore as any child was born, the father began to have a permanent interest in the lands ; he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy *initiate* ; and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant.

There are four requisites necessary to make a tenancy by the curtesy ; marriage, seizin of the wife, issue, and death of the wife.

1. The marriage must be canonical and legal.
2. The seizin of the wife must be an actual seizin, or possession of the lands ; not a bare right to possess, which is a seizin in law, but an actual possession, which is a seizin in deed.³ And therefore a man shall not be tenant by the curtesy of a remainder or reversion.⁴ But of

³ An illustration of seizin in law would be the acquisition of an estate in fee by inheritance, before entry had been made thereon. When entry had been made, the seizin would be seizin in fact. When a fee is conveyed by deed, the grantee has a seizin in fact without entry.

⁴ A man will not be entitled to tenancy by the curtesy of, nor a woman to dower out of, a reversion or remainder expectant upon a *life estate*, unless the life estate terminate during the marriage, so that her expectant estate vests in possession. (*Ferguson v. Tweedy*, 43 N. Y. 543.) But upon a reversion or remainder expectant upon an estate *for years*, both dower and curtesy accrue. The wife's estate of inheritance must be the first estate of freehold, in order to entitle the husband to curtesy therein.

If the wife's estate depend upon a condition, and a forfeiture takes place for breach of condition, the right of curtesy is destroyed at the same time, since the entry for breach of condition is regarded as destroying or extinguishing the estate from the beginning (*ab initio*). (Kent's Comm. IV. 33.) But if her estate depend upon a conditional limitation, the generally maintained doctrine now is that the husband has curtesy therein, although the contin-

some incorporeal hereditaments a man may be tenant by the curtesy, though there have been no actual seizin of the wife : as in case of an advowson, where the church has not become void in the lifetime of the wife : which a man may hold by the curtesy, because it is impossible ever to have actual seizin of it, and *impotentia excusat legem*. If the wife be an idiot, the husband shall not be tenant by the curtesy of her lands.⁵ For the king by prerogative is entitled to them, the instant she herself has any title : and since she could never be rightfully seized of the lands, and the husband's title depends entirely upon her seizin, the husband can have no title as tenant by the curtesy. 3. The issue must be born alive. Some have had a notion that it must be heard to cry ; but that is a mistake. Crying indeed is the *strongest* evidence of its being born alive ; but it is not the *only* evidence. The issue also must be born during the life of the mother ; for if the mother dies in labor, and the Cæsarean operation is performed, the husband in this case shall not be tenant by the *128] *curtesy ; because, at the instant of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child while he was yet in his mother's womb ; and the estate being once so vested, shall not afterwards be taken from him.⁶ In gavelkind lands, a husband may be tenant by the curtesy, without having any issue. But in general there must be issue born : and such issue as is also capable of inheriting the mother's estate. Therefore, if a woman be tenant in tail *male*, and hath only a *daughter* born, the husband is not thereby entitled to be tenant by the curtesy ; because such issue female can never inherit the estate in tail male. And this seems to be

gent event happens which causes the estate in the wife to cease or be transferred. Similar principles prevail in the main, in regard to dower in contingent estates. (*See Hatfield v. Sneden*, 54 N. Y. 280.)

If the wife have an estate held in trust for her benefit, the husband will be entitled to curtesy therein, for although the estate is an equitable one, courts of equity will give the husband the benefit of curtesy therein as he would receive in legal estates. But there is no curtesy in estates which she holds as trustee for another.

⁵ When the wife is an idiot or lunatic at the time of marriage, the marriage, being *void* at common-law for this disability, there can be no curtesy. (*Fenkins v. Fenkins' Heirs*, 2 Dana (Ky.) 102 ; see 22 O. St. 271 ; 18 Kan. 371.) But a *voidable* marriage must be avoided during the wife's life to deprive the husband of curtesy. (*See ante*, page 145.)

⁶ See *Marsellis v. Thalhimer*, 2 Paige, 35.

the principal reason, why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seized : because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife : but no one, by the standing rule of law, can be heir to the ancestor of any land, whereof the ancestor was not actually seized ; and therefore as the husband hath never begotten any issue that can be heir to those lands, he shall not be tenant of them by the curtesy. And hence we may observe, with how much nicety and consideration the old rules of law were framed ; and how closely they are connected and interwoven together, supporting, illustrating, and demonstrating one another. The time when the issue was born is immaterial, provided it were during the coverture ; for, whether it were before or after the wife's seizin of the lands, whether it be living or dead at the time of the seizin, or at the time of the wife's decease, the husband shall be tenant by the curtesy. The husband by the birth of the child becomes (as was before observed) tenant by the curtesy *initiate* and may do many acts to charge the lands, but his estate is not *consummate* till the death of the wife : which is the fourth and last requisite to make a complete tenant by the curtesy.

*IV. Tenant in *dower* is where the husband of a woman [*129 is seized of an estate of inheritance, and dies ; in this case, the wife shall have the third part of all the lands and tenements whereof he was seized at any time during the coverture, to hold to herself for the term of her natural life.

Dower is called in Latin by the foreign jurists *doarium*, but by Bracton and our English writers *dos* : which among the Romans signified the marriage portion, which the wife brought to her husband ; but with us is applied to signify this kind of estate to which the civil law, in its original state, had nothing that bore a resemblance : nor indeed is there any thing in general more different, than the regulations of landed property according to the English and Roman laws. Dower out of the lands seems also to have been unknown in the early part of our Saxon constitution ; for in the laws of King Edmond, the wife is directed to be supported wholly out of the personal estate. Afterwards, as may be seen in gavelkind tenure, the widow became entitled to a conditional estate in one half of the lands ; with a proviso that she remained chaste and unmarried ; as is usual also in copyhold

dowers, or free bench. Yet some have ascribed the introduction of dower to the Normans, as a branch of *their* local tenures; though we cannot expect any feudal reason for its invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system (wherein it was called *triens*, *tertia* and *dotalitium*) by the Emperor Frederick the Second; who was contemporary with our King Henry III. It is possible therefore, that it might be with us the relic of a Danish custom: since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of our Canute the Great, out of gratitude to the Danish ladies, who sold *130] all their *jewels to ransom him when taken prisoner by the Vandals. However this be, the reason which our law gives for adopting it, is a very plain and sensible one; for the sustenance of the wife, and the nurture and education of the younger children.

In treating of this estate, let us, first, consider *who* may be endowed; secondly, of *what* she may be endowed; thirdly, the manner *how* she shall be endowed; and fourthly, how dower may be *barred* or prevented.

1. Who may be endowed. She must be the actual wife of the party at the time of his decease. If she be divorced *a vinculo matrimonii*, she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dos*. But a divorce *a mensâ et thoro* only, doth not destroy the dower; no, not even for adultery itself by the common law.⁷ Yet now by the statute Westm. 2, if a woman

⁷ It will be remembered that, at the time when Blackstone wrote, divorce *a vinculo* was granted only for causes existing previous to the marriage, or in cases of "nullity" of the marriage contract, as it is termed, while adultery was only a cause for divorce *a mensâ et thoro*. But in the United States, at the present day, total divorce is generally granted for adultery, and in some of the States for various other causes arising after the marriage; and the marriage is not then considered as void from the beginning, but as valid until the decree is rendered. It is, therefore, the rule in a number of the States, usually declared by statutory provisions, that if the divorce be on the ground of the wife's adultery, she shall lose her right of dower, but if on the ground of her husband's adultery, she shall retain her dower. Such is the case in New York. (4 N. Y. 95; see 103 N. Y. 284.) In some States, moreover, total divorce for certain other causes, which the statutes mention, has the same effect upon the wife's dower-right. Such right is barred by a divorce for her misconduct, but not for that of her husband. But it is the ordinary rule, in these cases, that a divorce must ac-

voluntarily leaves (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her. It was formerly held, that the wife of an idiot might be endowed, though the husband of an idiot could not be tenant by the curtesy; but as it seems to be at present agreed, upon principles of sound sense and reason, that an idiot cannot marry, being incapable of consenting to any contract, this doctrine cannot now take place. By the ancient law, the wife of a person attainted of treason or felony could not be endowed; to the intent, says Staunforde, that if the love of a man's own life cannot restrain him from such atrocious acts, the love of his wife and children may; though Britton gives it another turn: *viz.*, that it is presumed the wife was privy to her husband's crime. However, the statute 1 Edw. VI. ch. 12., abated the rigor of the common law in this particular and allowed * the wife her dower. But a subsequent statute [*131 revived this severity against the widows of traitors, who are now barred of their dower (except in the case of certain modern treasons relating to the coin), but not the widows of felons. An alien also cannot be endowed, unless she be queen consort; for no alien is capable of holding lands.⁸ The wife must be above

tually be decreed, and that the mere commission of adultery by the wife will not be sufficient to deprive her of dower. (*Pitts v. Pitts*, 52 N. Y. 593; see also 118 N. Y. 549; 24 Wend. 193.) It is, however, true that in several States, the statute Westm. 2, is regarded as still in force, so that elopement with an adulterer bars dower, but the generally prevailing doctrine is otherwise. In some States, it is provided that a party whose own adultery has caused a divorce shall not marry again during the life of the other party. If, therefore, a man is under such a prohibition, and again marries *within the State* during his first wife's life, the second marriage is void, and the second wife has no dower. (*Cropsey v. Ogden*, 11 N. Y. 228.) So a decree of *nullity* of the marriage would still destroy the right of dower. But divorce *a mensâ et thoro* does not dissolve the marriage, and the wife still has dower. (*Day v. West*, 2 Edward Ch. 592.)

Similar statutes have been passed in various States in regard to the husband's right of curtesy, this being barred by total divorce for his own misconduct, but not for that of his wife.

In States having no such statutory provisions, the general rule prevails that a total divorce for any cause bars dower. (111 U. S. 523; 61 Ia. 174.)

⁸ But now it is the rule both in England and in this country, that if an alien woman be naturalized or become a citizen by marriage to a citizen, she will be entitled to dower. The disability in this respect of alien women, who are wives of aliens, has also been removed in a number of the States by statute.

nine years old at her husband's death, otherwise she shall not be endowed : though in Bracton's time the age was indefinite, and dower was then only due "*si uxor possit dotem promereri, et virum sustinere.*"

2. We are next to inquire, of what a wife may be endowed. And she is now by law entitled to be endowed of all lands and tenements, of which her husband was seized in fee-simple or fee-tail, at any time during the coverture ; and of which any issue which she might have had, might by possibility have been heir. Therefore, if a man seized in fee-simple, hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands ; for her issue might by possibility have been heir, on the death of the son by the former wife. But if there be a donee in special tail who holds lands to him and the heirs of his body begotten on Jane his wife ; though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed ; for no issue that she could have, could by any possibility inherit them. A seizin in law of the husband will be as effectual as a seizin in deed, in order to render the wife dowable ; for it is not in the wife's power to bring the husband's title to an actual seizin, as it is in the husband's power to do with regard to the wife's lands : which is one reason why he shall not be tenant by the curtesy but of such lands whereof the wife, or he himself in her right, was actually seized in deed. The seizin of the husband, for a *132] *transitory instant *only*, when the same act which gives him the estate conveys it also out of him again (as where, by a fine, land is granted to a man, and he immediately renders it back by the same fine), such a seizin will not entitle the wife to dower : for the land was merely *in transitu*, and never rested in the husband, the grant and render being one continued act.⁹

⁹ The right of dower does not so much depend upon the instantaneous character of the seizin, as upon the point whether the husband's seizin is *beneficial* or not. Where he is a mere conduit, as it were, or intermediary, to transfer the beneficial interest to another, his wife has no dower. But if he acquires a *beneficial* seizin himself, though but for an instant, the right of dower at once attaches. A good illustration of an instantaneous seizin not beneficial, is where the husband purchases a piece of land, and receives the deed, but gives back a mortgage upon the premises for the purchase-money. This is regarded as constituting but a single transaction, and the wife's dower-right is subject to the mortgage. (*Brackett v. Baum*, 50 N. Y. 8 ; *Kittle v. Van Dyck*, 1 Sandf. Ch. 76 ; *Smith v. McCarty*, 119 Mass. 519.)

But, if the land abides in him for the interval of but a *single moment*, it seems that the wife shall be endowed thereof. (a) And, in short, a widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, under the restrictions before mentioned ; unless there be some special reason to the contrary.¹⁰ Thus a woman shall not be endowed of a castle built for defence of the realm : nor of a common without stint ; for, as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly stocked. Copyhold estates are also not liable to dower, being only estates at the lord's will ; unless by the special custom of the manor, in which case it is usually called the widow's free bench. But, where dower is allowable, it matters not though

(a) This doctrine was extended very far by a jury in Wales, where the father and son were both hanged in one cart, but the son was supposed to have survived the father, by appearing to struggle longest : whereby he became seized of an estate in fee by survivorship, in consequence of which seizin his widow had a verdict for her dower. (Cro. Eliz. 503.)

¹⁰ The rules in regard to dower in remainders and reversions, in estates upon condition, and upon conditional limitation, are the same as in the law of curtesy. (See *ante*, note 4, and *Durando v. Durando*, 23 N. Y. 331 ; *House v. Jackson*, 50 N. Y. 161 ; *Hatfield v. Sneden*, 54 N. Y. 280.) But if the estate depend upon a collateral limitation, as if conveyed to a man and his heirs so long as a tree shall stand, its determination will defeat the right of dower. (Kent's Comm. IV, 49 ; see 45 Hun, 564.)

It was formerly the rule in England, that a widow was not entitled to dower in the equitable estates of her husband, although a different rule prevailed in regard to the husband's right of curtesy. But now it is provided by statute that dower shall be had in such estates of inheritance. (3 & 4 Will. IV. ch. 105.) In the United States it is the general rule that dower shall be given in equitable, as well as in legal estates. Thus, the wife of a person for whom property was held in trust, would have dower therein. But the wife of a trustee has no dower in the trust property, which he holds for the benefit of another. (*Cooper v. Whitney*, 3 Hill, 95.)

When the husband's estate has been mortgaged, the wife will take dower without regard to the mortgage, when the mortgage was given after marriage, without her relinquishment of dower being evidenced by her becoming a party to the instrument. But her right of dower will be subject to the mortgage : (1) when the mortgage was given before marriage ; (2) when it was given after marriage for the purchase-money of the premises ; (3) when it was given after marriage, and she united in the conveyance. If, in these three last cases, the land was sold for the payment of the mortgage, she would only have dower in the surplus money, if any, which remained. (*Coles v. Coles*, 15 Johns. 319 ; *Titus v. Neilson*, 5 Johns. Ch. 452 ; *Swaine v. Perrine*, 5 Johns. Ch. 482.) But these various rules are subject to modification by statute, and may be somewhat varied in different States. (See 105 Ill. 342 ; 61 Mich. 608.)

the husband alien the lands during the coverture; for he aliens them liable to dower.

3. Next, as to the manner in which a woman is to be endowed. There are now subsisting four species of dower; the fifth, mentioned by Littleton, *de la plus belle*, having been abolished together with the military tenures, of which it was a consequence. 1. Dower by the *common law*; or that which is before described. 2. Dower by particular *custom*; as that the wife should have half the husband's lands, or in some places the whole, and in some only a quarter. 3. Dower *ad ostium ecclesiæ* *133] *siæ*: which is where tenant in *fee-simple of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made and (Sir Edward Coke in his translation of Littleton, adds) troth plighted between them, doth endow the wife with the whole, or such quantity as he shall please, of his lands; at the same time specifying and ascertaining the same; on which the wife, after her husband's death, may enter without farther ceremony. 4. Dower *ex assensu patris*; which is only a species of dower *ad ostium ecclesiæ*, made when the husband's father is alive, and the son by his consent, expressly given, endows his wife with parcel of his father's lands. In either of these cases, they must (to prevent frauds) be made *in facie ecclesiæ et ad ostium ecclesiæ; non enim valent facta in lecto mortali, nec in camerâ, aut alibi ubi clandestina fuere conjugia*.¹¹

It is curious to observe the several revolutions which the doctrine of dower has undergone, since its introduction into England. It seems first to have been of the nature of the dower in gavelkind, before-mentioned; *viz.* a moiety of the husband's lands, but forfeitable by incontinency or a second marriage. By the famous charter of Henry I., this condition of widowhood and chastity was only required in case the husband left any issue; and afterwards we hear no more of it. Under Henry the Second, according to Glanvil, the dower *ad ostium ecclesiæ* was the most usual species of dower; and here, as well as in Normandy, it was binding upon the wife, if by her consented to, at the time of marriage. Neither, in those days of feudal rigor,

¹¹ Dower *ad ostium ecclesiæ*, and *ex assensu patris* have been abolished in England by statute. The only variety of dower of any importance in this country is "dower by the common law," as modified by statute.

was the husband allowed to endow her *ad ostium ecclesiæ* with more than the third part of the lands whereof he then was seized, though he might endow her with less ; lest by such liberal endowments the lord should be defrauded of his wardships and other feudal profits. But if no specific dotation was made at the *church porch, then she was endowed *by the common* [*134 *law* of the third part (which was called her *dos rationabilis*) of such lands and tenements as the husband was seized of at the time of the espousals, and no other ; unless he specially engaged before the priest to endow her of his future acquisitions : and, if the husband had no lands, an endowment in goods, chattels, or money, at the time of espousals, was a bar of any dower in lands which he afterwards acquired. In King John's *magna charta*, and the first chapter of Henry III., no mention is made of any alteration of the common law, in respect of the lands subject to dower : but in those of 1217 and 1224, it is particularly provided, that a widow shall be entitled for her dower to the third part of *all* such lands as the husband had held in his lifetime : yet in case of a specific endowment of less *ad ostium ecclesiæ*, the widow had still no power to waive it after her husband's death. And this continued to be law during the reigns of Henry III. and Edward I. In Henry IV.'s time it was denied to be law, that a woman can be endowed of her husband's goods and chattels ; and, under Edward IV., Littleton lays it down *expressly, that a woman may be endowed *ad ostium* [*135 *ecclesiæ* with more than a third part ; and shall have her election, after her husband's death, to accept such dower or refuse it, and betake herself to her dower at common law. Which state of uncertainty was probably the reason, that these specific dowers, *ad ostium ecclesiæ* and *ex assensu patris*, have since fallen into total disuse.

I proceed, therefore, to consider the method of endowment or assigning dower, by the common law, which is now the only usual species. By the old law, grounded on the feudal exactions, a woman could not be endowed without a fine paid to the lord : neither could she marry again without his license ; lest she should contract herself, and so convey part of the feud to the lord's enemy. This license the lords took care to be well paid for ; and, as it seems, would sometimes force the dowager to a second marriage, in order to gain the fine. But, to remedy these

oppressions, it was provided, first by the charter of Henry I. and afterwards by *magna charta*, that the widow shall pay nothing for her marriage, nor shall be distrained to marry afresh, if she chooses to live without a husband ; but shall not however marry against the consent of the lord ; and farther, that nothing shall be taken for assignment of the widow's dower, but that she shall remain in her husband's capital mansion-house for forty days after his death, during which time her dower shall be assigned. These forty days are called the widow's *quarantine*, a term made use of in law to signify the number of forty days, whether applied to this occasion, or any other.¹² The particular lands, to be held in dower, must be assigned by the heir of the husband, or his guardian ; not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so holden. For the heir by this *136] entry becomes tenant *thereof to the lord, and the widow is immediate tenant to the heir, by a kind of subinfeudation, or under-tenancy completed by this investiture or assignment ; which tenure may still be created, notwithstanding the statute of *quia emptores*, because the heir parts not with the fee-simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the term of quarantine, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it. Or if the heir (being under age) or his guardian assign more than she ought to have, it may be afterwards remedied by writ of *admeasurement* of dower. If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds ; but if it be indivisible, she must be endowed specially ; as of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, and the like.¹⁸

¹² The widow's right of quarantine is well established in this country, though the period of its duration has been, in some States, changed by statute.

¹⁸ The proper methods for securing the assignment of dower are usually prescribed by the statutes of the several States. If the assignment is not made voluntarily by the tenant of the freehold, the usual practice is for the widow to bring a suit in equity to determine her right, or an action of ejectment at law ; while in some States, she may apply to the probate or surrogate court for an admeasurement of the dower. The suit in equity is generally the most convenient and efficacious process, when there is any controversy in regard to the right of dower, since the rights of all the parties concerned can be determined in a single proceeding.

Upon preconcerted marriages, and in estates of considerable consequence, tenancy in dower happens very seldom: for the claim of the wife to her dower at the common law diffusing itself so extensively, it became a great clog to alienation, and was otherwise inconvenient to families. Wherefore, since the alteration of the ancient law respecting dower *ad ostium ecclesiæ*, which hath occasioned the entire disuse of that species of dower, jointures have been introduced in their stead, as a bar to the claim at common law. Which leads me to inquire, lastly.

4. How dower may be *barred* or prevented. A widow may be barred of her dower not only by elopement, divorce, being an alien, the treason of her husband,¹⁴ and other disabilities before-mentioned, but also by detaining the title deeds or evidences of the estate from the heir, until she restores them: and, by the statute of Gloucester, if a dowager aliens the land assigned her for dower, she forfeits it *ipso facto*, and the heir may re-[*137 cover it by action. A woman also may be barred of her dower, by levying a fine, or suffering a recovery of the lands,¹⁵ during her coverture.¹⁶ But the most usual method of barring dowers is by jointures, as regulated by the statute 27 Hen. VIII. ch. 10.

¹⁴ Forfeiture of dower, on account of the husband's treason, has never existed in the United States. So the rule in regard to the detention of title-deeds never prevailed here.

¹⁵ The most common method of barring dower in the United States is for the wife to unite in a conveyance of the property with the husband, appropriate words being used in the instrument to indicate her release or relinquishment of her right. It is usually required, in such cases, that the wife shall be examined separately and apart from her husband, and make acknowledgment that she executes the instrument without any fear or compulsion from him. A certificate to this effect should be endorsed upon the deed by the officer before whom the acknowledgment is made. The practice, in this respect, is generally governed by statute. (See *Elmendorf v. Lockwood*, 57 N. Y. 322; also 105 N. Y. 332.) But the wife is not bound by uniting in the conveyance, if she were a minor at the time. (*Priest v. Cummings*, 16 Wend. 617.)

¹⁶ By statute 3 & 4 Will. IV., ch. 105 (passed in 1834), known as the Dower Act, the right of dower is now in England placed entirely within the control of husbands, and may be barred by them at their pleasure. For, since that year, no widow can be endowed of any land which shall have been disposed of by her husband in his life-time, or by his will. So her dower may be barred by a declaration in a conveyance to the husband, that she shall not be entitled to dower, or a similar declaration in his will, or a devise to her of any land out of which she might have been endowed. The consequence has

A jointure, which, strictly speaking, signifies a joint estate, limited to both husband and wife, but in common acceptance extends also to a sole estate, limited to the wife only, is thus defined by Sir Edward Coke; “a competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least.” This description is framed from the purview of the statute 27 Henry VIII. ch. 10, before-mentioned; commonly called the statute of *uses*, of which we shall speak fully hereafter. At present I have only to observe, that before the making of that statute, the greatest part of the land of England was conveyed to uses; the property or possession of the soil being vested in one man, and the *use*, or profits thereof, in another; whose directions, with regard to the disposition thereof, the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now, though a husband had the *use* of lands in absolute fee-simple, yet the wife was not entitled to any dower therein; he not being *seized* thereof: wherefore it became usual, on marriage, to settle by express deed some special estate to the use of the husband and his wife, for their lives, in joint-tenancy, or jointure; which settlement would be a provision for the wife in case she survived her husband. At length the statute of uses ordained, that such as had the *use* of lands should, to all intents and purposes, be reputed and taken to be absolutely *seized* and possessed of the soil itself. In consequence of which legal seizin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure: had *136] not the same statute provided, that *upon making such an estate in jointure to the wife before marriage, she shall be forever precluded from the dower. But then these four requisites must be punctually observed: 1. The jointure must take effect immediately on the death of the husband. 2. It must be for her own life at least, and not *pur auter vie*, or for any term of years.

been to quite effectually do away with the right of dower in England, except in infrequent instances, where the husband does not desire to bar her right. But in this country, wherever dower has been retained, no such extensive power has been given to husbands, and the law of dower remains more upon its common-law basis in this respect.

or other smaller estate. 3. It must be made to herself, and no other in trust for her. 4. It must be made, and so in the deed particularly expressed to be in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her *after* marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiæ*, and may either accept it, or refuse it and betake herself to her dower at common law ; for she was not capable of consenting to it during coverture. And if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then (by the provisions of the same statute) have her dower *pro tanto* at the common law.

There are some advantages attending tenants in dower that do not extend to jointresses ; and so *vice versa*, jointresses are in some respects more privileged than tenants in dower. Tenant in dower by the old common law is subject to no tolls or taxes ; and hers is almost the only estate on which, when derived from the king's debtor, the king cannot distrain for his debt ; if contracted during the coverture. But, on the other *hand, a [*139 widow may enter at once, without any formal process, on her jointure land ; as she also might have done on dower *ad ostium ecclesiæ*, which a jointure in many points resembles ; and the resemblance was still greater, while that species of dower continued in its primitive state : whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower. And, what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow. Wherefore Sir Edward Coke very justly gives it the preference, as being more sure and safe to the widow, than even dower *ad ostium ecclesiæ*, the most eligible species of any.¹⁷

¹⁷ The principles stated in the text, in regard to jointure are those established and enforced in courts of law. But in courts of equity, different rules are applied upon this subject, and a distinction is therefore taken between *legal jointure* and *equitable jointure*. In equity, it is not necessary that the provision for the wife should be a freehold estate in lands. An estate for years, or a provision in money or personal property, will be sufficient. The provision may, moreover, be given to a person in trust for the wife, instead of being settled upon the wife herself. So an actual settlement need not be made upon the wife ; but an agreement to confer upon her a provision will be sufficient, and its stipulations will be duly enforced. It is also an important

CHAPTER IX.

[BL. COMM. — BOOK II. CH. IX.]

Of Estates less than Freehold.

OF estates that are less than freehold, there are three sorts:
 1. Estates for years: 2. Estates at will: 3. Estates by sufferance.

I. An estate for *years* is a contract for the possession of lands or tenements, for some determinate period; and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, (a) and the lessee enters thereon. If the lease be but for

rule in equity that the wife must give her consent to the provision made for her benefit, or her dower will not be barred. If she is an infant, the consent of her parent or guardian should be obtained. If the wife assent to a provision before marriage, her dower will be barred; but if after marriage, she may elect between dower and the provision.

In this country, the English law of jointures has been considerably changed by statute in a number of the States. In some States, the distinction between legal and equitable jointure is no longer maintained, and the subject is governed entirely by statute. The tendency of legislation has been to adopt the principles established in equity, as the law upon this subject, and to allow valuable provisions of any kind to be given, while at the same time the consent of the wife is required to be obtained.

Another important mode of barring dower is by giving the wife a testamentary provision in the husband's will, which is declared to be in lieu or bar of dower, or which cannot, consistently with the proper execution of the provisions in the will, be received together with dower. If there be such a positive declaration of the husband's intent to bar dower, or it be manifestly inconsistent for her to take both dower and the provision, she will have a right to elect which she will take, but cannot receive both. Statutes usually prescribe a time within which such election shall be signified. But, in other cases, she will receive both dower and the provision given by the will. Any kind of property may be given in a will in lieu of dower. (*Konvalinka v. Schlegel*, 104 N. Y. 125; *Akin v. Kellogg*, 119 N. Y. 441; *Lawrence's Appeal*, 49 Conn. 411; *Russell v. Minton*, 42 N. J. Eq. 123.)

(a) We may here remark, once for all, that the terminations of "—or" and "—ee" obtain, in law, the one an active, the other a passive, signification; the former usually denoting the doer of any act, the latter him to whom

half a year or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of. And this may, not improperly, lead us into a short digression, concerning the division and calculation of time by the English law.

The space of a *year* is a determinate and well-known period, consisting commonly of 365 days; for, though in *bissextile [*141 or leap-years, it consists properly of 366, yet by the statute 21 Hen. III. the increasing day in the leap-year, together with the preceding day, shall be accounted for one day only. That of a *month* is more ambiguous: there being, in common use, two ways of calculating months; either as lunar, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year: or, as calendar months of unequal lengths, according to the Julian division in our common almanacs, commencing at the calends of each month, whereof in a year they are only twelve. A month in law is a lunar month or twenty-eight days, unless otherwise expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease for "twelve months" is only for forty-eight weeks; but if it be for "*a* twelvemonth" in the singular number, it is good for the whole year. For herein the law recedes from its usual calculation, because the ambiguity between the two methods of computation ceases; it being generally understood that by the space of time called thus, in the singular number, a twelvemonth, is meant the whole year, consisting of one solar revolution.¹ In the space of a *day* all the twenty-four hours are usually reckoned, the law generally rejecting all fractions of a day, in order to avoid disputes. Therefore, if I am bound to pay money on any certain day, I discharge the obligation if I pay it before twelve o'clock at night; after which the following day commences. But to return to estates for years.

it is done. The feoffor is he that maketh a feoffment; the feoffee is he to whom it is made: the donor is one that giveth lands in tail; the donee is he who receiveth it: he that granteth a lease is denominated the lessor; and he to whom it is granted the lessee. (Litt. § 57.)

¹ The term "month" is generally held, in the United States, to denote a calendar, and not a lunar month, unless otherwise expressed. This rule applies to all written instruments, and is usually prescribed by statute. (2 Wall. 177.)

These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords: but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to *142] *receive and account for the profits at a settled price, than as having any property of their own. And therefore they were not allowed to have a freehold estate: but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any time defeated by a common recovery suffered by the tenant of the freehold; which annihilated all leases for years then subsisting, unless afterwards renewed by the recoveror, whose title was supposed superior to his by whom those leases were granted.

While estates for years were thus precarious, it is no wonder that they were usually very short, like our modern leases upon rack-rent; and indeed we are told that by the ancient law no leases for more than forty years were allowable, because any longer possession (especially when given without any livery declaring the nature and duration of his estate) might tend to defeat the inheritance. Yet this law, if ever it existed, was soon antiquated; for we may observe in Madox's collection of ancient instruments, some leases for years of a pretty early date, which considerably exceed that period: and long terms, for three hundred years or a thousand, were certainly in use in the time of Edward III., and probably of Edward I. But certainly when by the statute 21 Hen. VIII. ch. 15. the termor (that is, he who is entitled to the term of years) was protected against these fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before; and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages: continuing subject, however, *143] to the same rules of succession, *and with the same inferiority to freeholds, as when they were little better than tenancies at the will of the landlord.

Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years.² And therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited, and determined: for every such estate must have a certain beginning and certain end. But *id certum est, quod certum reddi potest*: therefore if a man make a lease to another, for so many years as J. S. shall name, it is a good lease for years; for though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery, of the lease. A lease for so many years as J. S. shall live, is void from the beginning; for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease. And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale; for this is still more uncertain. But a lease for twenty or more years, if J. S. shall so long live, or if he should so long continue parson, is good: for there is a certain period fixed, beyond which it cannot last; though it may determine sooner, on the death of J. S. or his ceasing to be parson there.

We have before remarked, and endeavored to assign the reason of the inferiority in which the law places an estate for years, when compared with an estate for life, or an inheritance: observing that an estate for life, even if it be *per auter vie*, is a freehold; but that an estate for a thousand years is only a chattel, and reckoned part of the personal estate. Hence it follows, that a lease for years may be made to commence *in futuro*, though a lease for life cannot. As, if I grant lands to Titius to hold from Michaelmas next for *twenty years, this is good; but to hold from [*144 Michaelmas next for the term of his natural life, is void. For no estate of freehold can commence *in futuro*; because it cannot be created at common law without livery of seizin, or corporal posses-

² It is the general rule that leases for a term exceeding three years, must be made in writing. Originally by the English statute regulating this matter (known as the Statute of Frauds,) a lease for three years, or less, might be made orally, and in some of the United States, the same rule still prevails. But in others this period has been reduced. Thus, in New York, leases for one year may be made orally, but not for any longer time. Provisions upon this point will be found in the statutes of the several States. (75 N. Y. 205; 112 Pa. St. 272.)

sion of the land: and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter. And because no livery of seizin is necessary to a lease for years, such lessee is not said to be *seized*, or to have true legal seizin of the lands. Nor indeed does the bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement which right is called his *interest in the term*, or *interesse termini*: but when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is *possessed*, not properly of the land, but of the term of years; the possession or seizin of the *land* remaining still in him who hath the freehold. Thus the word, *term*, does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the *term* may expire, during the continuance of the *time*; as by surrender, forfeiture, and the like. For which reason, if I grant a lease to A for the term of three years, and after the expiration of the said *term*, to B for six years, and A surrenders or forfeits his lease at the end of *one* year, B's interest shall immediately take effect: but if the remainder had been to B from and after the expiration of the said *three years*, or from and after the expiration of the said *time*, in this case B's interest will not commence till the time is fully elapsed, whatever may become of A's term.

Tenant for term of years hath incident to and inseparable from his estate, unless by special agreement, the same estovers, which we formerly observed that tenant for life was entitled to; that is to say, house-bote, fire-bote, plough-bote, and hay-bote; terms which have been already explained.

*145] *With regard to emblements, or the profits of lands sowed by tenant for years, there is this difference between him and tenant for life: that where the term of tenant for years depends upon a certainty, as if he holds from midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before midsummer, the end of his term, the landlord shall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he could never reap the profits of. But where the lease for years depends upon an uncertainty; as, upon the death of a lessor, being himself only tenant for life, or being a husband seized in right of his wife; or if the term of years be determinable upon a life or lives;

in all these cases the estate for years not being certainly to expire at a time foreknown but merely by the act of God, the tenant, or his executors, shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto. Not so, if it determine by the act of the party himself: as if tenant for years does any thing that amounts to a forfeiture: in which case the emblements shall go to the lessor and not to the lessee, who hath determined his estate by his own default.⁸

⁸ There are many legal principles of much importance in the law of landlord and tenant, to which Blackstone makes no reference. A few of the most important of these may be briefly noticed:—

1. *The principal duties of a tenant for years.*—The chief duties of the tenant are: to pay rent, to refrain from denying the landlord's title, to make ordinary repairs, to refrain from committing waste, and to strictly observe and fulfil the conditions and covenants in the lease. In fact, this last clause might ordinarily be deemed to embrace the tenant's general duties, since the express provisions in the lease usually include most of the other obligations mentioned. But if this were not the case, the duty to pay rent, etc., would still exist, depending upon the occupancy of the premises under the contract. (1) If there were no covenant to pay rent, an action "for use and occupation," as it is termed, may be brought to recover the reasonable value of the possession of the premises for the term. (2) The duty to refrain from denying the landlord's title, prohibits the tenant, when sued for rent, or for the possession of the premises, from setting up in defence, that the landlord has no title in the premises. Having accepted possession under the landlord, he is bound to acknowledge his title. But if the tenant be evicted by one having a superior title to the property, this obligation will no longer be binding upon him: and there are other exceptions to the rule, not necessary to be here noticed. (*Tilyou v. Reynolds*, 108 N. Y. 558; see 92 U. S. 107; 131 Mass. 566; 50 Mich. 33.) (3) The duty to make repairs is usually defined by the terms of the lease, and assumed either by the landlord or the tenant, as they may agree. But in the absence of any stipulations of this kind, no obligation to repair would rest upon the landlord, and the tenant would only be bound to make ordinary repairs. This duty usually extends no farther than to keep the premises "wind and water tight." He should, for instance, repair the roof, if it becomes leaky. (See *Suydam v. Jackson*, 54 N. Y. 450; 52 N. Y. 512; 94 U. S. 53; 66 Wis. 500; 29 Minn. 385.) In making a lease, the landlord is not regarded as impliedly warranting that the premises are tenantable or habitable, and the tenant must examine carefully for himself in regard to their condition. If he enters, he will be bound by the lease, though the premises are unsuitable to occupy, unless the landlord were guilty of fraud. (118 N. Y. 110; 50 N. J. L. 167; 147 Mass. 471; 135 Mass. 380; 60 N. Y. 229; 29 Minn. 91.) (4) The tenant must refrain from committing waste upon the premises. The meaning of the term "waste" has been already explained under the topic of estates for life. This subject is not infrequently regulated by stipulations in the lease.

II. The second species of estates not freehold, are estates at *will*. An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor;

(5) The conditions and covenants in the lease, are the provisions embodying the agreements of the parties, and may be of any nature the parties see fit to agree upon, if they are not in conflict with general principles of law. A condition is in the nature of a proviso, and gives the landlord a right to enter and recover possession of the premises, if its terms are not complied with. A covenant is in the nature of a contract, and for a breach thereof, an action for damages may be maintained. Frequently the same provision is so drawn as to constitute both a condition and a covenant, so that the landlord may have a choice of remedies. Moreover, in the case of a covenant, a suit in equity may sometimes be brought to secure the specific performance of its stipulations. The landlord may be bound by covenants as well as the tenant, and for a violation of them, the tenant may sue him. (See 44 & 45 Vict. c. 41, ss. 10-15.)

II. *Assignment and Sub-tenancy*.—When a lease is made, there is said to arise a two-fold privity between landlord and tenant—a privity of contract, and a privity of estate. The former depends upon the agreement into which the parties enter, the latter upon their interests in the property leased. If the tenant transfers his entire interest in the whole or a part of the property to a third person, this is called an “assignment.” Thus, if the tenant holds three houses under a lease for ten years, he may transfer one, two or three of them to other persons for the whole period, and this will be an assignment. The assignee, in such a case, becomes liable to the original landlord, since, by the transfer, the privity of estate now subsists between these two. But the first tenant is still liable to the landlord upon privity of contract, though the privity of estate, so far as he is concerned, is ended. The landlord, however, can have but one satisfaction, though he may seek it from either party; and if the original tenant is forced to pay, he has a remedy over against the assignee.

But if the first tenant transfers only a part of his interest to another, retaining a reversionary interest in himself, as if, having a house under lease for ten years, he lets it to another for nine years, or for nine years and 364 days, this is not an assignment, but a sub-tenancy. The landlord, in such a case, is deemed to have neither privity of contract nor of estate with the sub-tenant, and cannot recover rent from him. The sub-tenant is liable only to the original lessee, who still remains liable to the landlord. (See *Damainville v. Mann*, 32 N. Y. 197; *Stewart v. L. I. R. Co.*, 102 N. Y. 601; *Sexton v. Chicago Storage Co.*, 21 N. E. Rep. 920 (Ill.); in Mass. a transfer of the entire term upon *new conditions* has been held a sub-lease, 131 Mass. 161.) The landlord may also assign his reversionary interest in the whole or a part of the premises, to third persons, who will then be entitled to recover their respective portions of the rent from the lessee. (See *Moffatt v. Smith*, 4 N. Y. 126; *Leiter v. Pike*, 127 Ill. 287; 44 & 45 Vict. c. 41, s. 10.)

III. *Eviction*.—The tenant may be deprived of his possession of the premises, either by a stranger having a superior title to the property, or by the landlord. This is called an *eviction*. If the eviction by a *stranger* be from

and the tenant by force of this lease obtains possession.⁴ Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other; because the lessor may determine his will, and put him out whenever he pleases. But every estate at will, is at the will of both parties, landlord and tenant; so that either of them may determine his will, and quit his connection with the other at his own pleasure. Yet this must be understood

a part of the premises, the tenant will be bound to pay rent according to the proportionate value of that part which remains; but if from the whole, he is altogether relieved from the duty of paying rent to the landlord. (*Home Life Insurance Co. v. Sherman*, 46 N. Y. 370.) This is only true, however, of subsequently accruing rent, and not of that which has already accrued. (*Giles v. Comstock*, 4 N. Y. 270.) But if the tenant is evicted by the landlord, from either the whole or a part of the premises, he is discharged from all the obligations of the lease for the time being. No rent is, therefore, recoverable for any portion of the premises of which he may still be in possession. Eviction by the landlord may be either actual or constructive. It is actual when there is a direct expulsion from the premises, or a deprivation of their possession; constructive, when the landlord does some act so seriously interfering with the enjoyment and occupancy of the premises that the tenant is justified in abandoning possession, and does abandon it in fact; as if, for example, the landlord lets one part of a house, and then converts the other into a house of prostitution. (8 Cow. 727; 4 N. Y. 217; 132 Mass. 367; 90 N. Y. 293; but see 112 Mass. 8.) But it is only in certain extreme cases, that the tenant will be justified in leaving the premises; and if the cause is in fact insufficient to warrant such an act, though he judged otherwise, he will still be responsible under the lease. (*Hilliard v. N. Y. Coal Co.*, 41 O. St. 662; see 106 Mass. 201; 55 N. Y. 280.) And the tenant must in fact leave the premises. But a mere trespass upon the property by the landlord will not be deemed an eviction.

At common law, if a tenant hired a house and lot, and the house was burned down, he was still bound to pay rent. But this onerous rule has been frequently changed, in modern times, by statute. But even at common law, if a tenant merely hires a room in a house which is destroyed by fire, his liability to pay rent ceases. (*Graves v. Berdan*, 26 N. Y. 498; *Harris v. Heackman*, 62 Ia. 411; *Miller v. Benton*, 55 Conn. 529.)

(There are various excellent treatises on the law of landlord and tenant, to which the student is referred; such as Taylor on Landlord and Tenant; Washburn on Real Property; Wood on Landlord and Tenant.)

⁴ When one enters upon land by permission of the owner for an indefinite period, even without the reservation of any rent, he is, by implication of law, a tenant at will. If he be placed upon the land as a mere occupier, without any term prescribed or rent reserved, he is strictly a tenant at will. Thus, where a householder permitted another to occupy rent free, the occupant was held to be such a tenant. (*Larned v. Hudson*, 60 N. Y. 102, and cases cited; see 136 Mass. 532; 13 R. I. 467.)

***147]** with some restriction. *For if the tenant at will sows his land, and the landlord before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits. And this for the same reason upon which all the cases of emblements turn; *viz.*, the point of uncertainty: since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land.

What act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now, I think, settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer; which must either be made upon the land, or notice must be given to the lessee), the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber, taking a distress for rent, and impounding it thereon, or making a feoffment, or lease for years of the land, to commence immediately; any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure, or, which is *instar omnium*, the death or outlawry of either lessor or lessee; puts an end to or determines the estate at will.

The law is, however, careful, that no sudden determination of the will by one party shall tend to the manifest and unforeseen ***148]** prejudice of the other. This appears in the case of *emblements before mentioned; and, by a parity of reason, the lessee, after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils. And if rent be payable quarterly or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half year. And, upon the same principle, courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be *tenancies from year to year* so long as both parties please, especially where an

annual rent is reserved: in which case they will not suffer either party to determine the tenancy even at the end of the year, without reasonable notice to the other, which is generally understood to be six months.⁵

* * * * *

III. An estate at *sufferance* is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As if a man takes a lease for a year, and after a year is expired, continues to hold the premises without any fresh leave from the owner of the estate. Or, if a man maketh a lease at will and dies, the estate at will is thereby determined: but if the tenant continueth possession, he is tenant at sufferance. But no man can be tenant at sufferance against the king, to whom no *laches*, or neglect in not entering and ousting the tenant is ever imputed by law; but his tenant, so holding over, is considered as an absolute intruder. But, in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant: for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger: and the reason is, because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful; unless the owner of the land by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful.

*Thus stands the law, with regard to tenants by suf- [*151

⁵ Where premises were leased "for the term of one year and an indefinite period thereafter," at an annual rent which the lessee agreed to pay, and he entered and occupied several years, he was held to be a tenant from year to year. Such an estate continues until determined by proper notice. It does not depend upon continuance of possession, for the tenant cannot put an end to the tenancy, or his liability for rent, by withdrawing from the occupancy of the premises. (*Pugsley v. Aikin*, 11 N. Y. 494.) The six months for which notice is given must terminate with the end of the tenant's year.

So, if a tenant for years holds over after the expiration of the lease by consent of the landlord, he becomes a tenant from year to year, if there be no special agreement of renewal between the parties, or a new lease entered into. (51 N. Y. 309; 60 Wis. 1; 123 Ill. 280; 13 Atl. Rep. 122 (R. I.)) The implication in such a case is that he holds the premises upon the same terms for another year. So a tenancy at will may be changed into one from year to year by the payment and acceptance of rent. (112 Pa. St. 272; 118 N. Y. 309.) In some States the doctrine of tenancy from year to year is not received, but all such estates are deemed tenancies at will; but this is not generally the case. (See 136 Mass. 532; 76 Ia. 760.)

ferance, and landlords are obliged in these cases to make formal entries upon their lands, and recover possession by the legal process of ejectment ; and at the utmost, by the common law, the tenant was bound to account for the profits of the land so by him detained. But now, by statute 4 Geo. II. ch. 28. in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall wilfully hold over after the determination of the term, and demand made and notice in *writing* given, by him to whom the remainder or reversion of the premises shall belong, for delivering the possession thereof ; such person, so holding over or keeping the other out of possession, shall pay for the time he detains the lands, at the rate of double their yearly *value*. And, by statute 11 Geo. II. ch. 19. in case any tenant, having power to determine his lease, shall give notice of his intention to quit the premises, and shall not deliver up the possession at the time contained in such notice, he shall thenceforth pay double the former *rent*, for such time as he continues in possession. These statutes have almost put an end to the practice of tenancy by sufferance, unless with the tacit consent of the owner of the tenement.⁶

CHAPTER X.

[BL. COMM.—BOOK II. CH. X.]

Of Estates upon Condition.

BESIDES the several divisions of estates, in point of interest, which we have considered in the three preceding chapters, there is also another species still remaining, which is called an estate *upon condition* ; being such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated. And these conditional estates I have chosen to re-

⁶ Similar statutes have been passed in some of the United States. In some States, it is further provided by statute that notice must be given to the tenant at sufferance before he can be dispossessed of the premises. (See 48 Me. 388 ; 14 R. I. 581 ; 132 Mass. 346.)

serve till las., because they are indeed more properly qualifications of other estates, than a distinct species of themselves; seeing that any quantity of interest, a fee, a freehold, or a term of years, may depend upon these provisional restrictions. Estates then, upon condition thus understood, are of two sorts: 1. Estates upon condition *implied*; 2. Estates upon condition *expressed*; under which last may be included, 3. Estates held *in vadio, gage, or pledge*; 4. Estates by *statute merchant, or statute staple*; 5. Estates held by *elegit*.

1. Estates upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office, on breach of which condition *it is lawful for the grantor, [*153 or his heirs, to oust him, and grant it to another person. For an office, either public or private, may be forfeited by *mis-user* or *non-user*, both of which are breaches of this implied condition. 1. By *mis-user*, or abuse; as if a judge takes a bribe, or a park-keeper kills deer without authority. 2. By *non-user*, or neglect; which in public offices, that concern the administration of justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture; but non-user of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby. For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention: but, private offices not requiring so regular and unremitted a service, the temporary neglect of them is not necessarily productive of mischief: upon which account some special loss must be proved, in order to vacate these. Franchises also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect.¹

¹ It is an implied condition, in the grant of a corporate franchise, that the corporation shall fulfil the end or purpose for which it was formed, and that it shall not exceed the powers with which it was vested, or usurp other functions not committed to it either expressly or by necessary implication. In case of a violation of such implied condition, a proceeding may be instituted,

Upon the same principle proceed all the forfeitures which are given by law of life estates and others ; for any acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenants for life or years enfeoff a stranger in fee-simple : this is, by the common law, a forfeiture of their several estates ; being a breach of the condition which the law annexes thereto, *viz.* that they shall not attempt to create a greater estate than they themselves are entitled to.² So if any tenants for years, for life, or in fee, commit a felony ; the king or other lord of the fee is entitled to have their tenements, because their estate is determined by the breach of the condition, " that they shall not commit felony," which the law tacitly annexes to every feudal donation.†

***154]** *II. An estate on condition expressed in the grant itself is where an estate is granted, either in *fee-simple or otherwise*, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition. These conditions are therefore either *precedent*, or *subsequent*. Precedent are such as must happen or be performed before the estate can vest or be enlarged : subsequent are such, by the failure or non-performance of which an estate already vested may be defeated.³ Thus, if an estate for life be limited to A upon his

† See *post*, page 1036, note 1.

in behalf of the State, to forfeit the corporate charter, and thus put an end to the existence of the corporation. (*Comm. v. Commercial Bk.*, 28 Pa. St. 389 ; *In re Elevated R. Co.*, 70 N. Y. 337 ; see 39 N. J. L. 28 ; 111 N. Y. 1.)

² This cause of forfeiture no longer exists in the English law. It is, moreover, the general rule in the United States, that the conveyance of a larger estate than the grantor possesses only operates to transfer the estate which he actually owns, and does not occasion a forfeiture. In a number of the States, there are statutes to this effect.

³ No precise technical words are required to render a condition either precedent or subsequent ; and its nature must, therefore, be determined, with reference to this distinction, by a consideration of the intent of the parties, as evidenced by their language and acts. In cases of ambiguity, the tendency is to favor that construction which would make a condition subsequent rather than precedent, since the estate thus becomes a vested one, and the vesting is not referred to the future. If, therefore, the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be done as well after as before the vesting of the estate, or if, from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate

marriage with B, the marriage is a precedent condition, and till that happens no estate is vested in A. Or, if a man grant to his lessee for years, that upon payment of a hundred marks within the term he shall have the fee, this also is a condition precedent, and the fee-simple passeth not till the hundred marks be paid. But if a man grants an estate in fee-simple, reserving to himself and his heirs a certain rent ; and that if such rent be not paid at the times limited, it shall be lawful for him and his heirs to re-enter, and avoid the estate : in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed. To this class may also be referred all base fees, and fee-simples conditional at the common law. Thus an estate to a man and his heirs, *tenants of the manor of Dale*, is an estate on condition that he and his heirs continue tenants of that manor. And so, if a personal annuity be granted at this day to a man and the heirs of his body, as this is no tenement within the statute of Westminster the second, it remains, as at common law, a fee-simple on condition that the grantee has heirs of his body. Upon the same principle depend all the determinable estates of freehold, which we mentioned in the eighth chapter : as *durante viduitate &c.* ; these are estates upon condition that the grantees do not marry, and the like. *155] And, on the breach of any of these *subsequent conditions by the failure of these contingencies ; by the grantee's not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing sole ; the estates which were respectively vested in each grantee are wholly determinable and void.

A distinction is however made between a *condition in deed* and a *limitation*, which Littleton denominates also a *condition in law*. For when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a *limitation* : as when land is granted to a man *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made 500*l.* and the like. In such case the estate determines as soon as the contingency happens (when he ceases to be parson, shall vest, and the grantee perform the act after taking possession, then the condition is subsequent. (*Underhill v. Saratoga and Washington R. R. Co.*, 20 Barb. 455, 460 ; *Parmelee v. Oswego, &c.*, R. Co., 6 N. Y. 74 ; see 5 Wall. 119.)

marries a wife, or has received the 500*l.*) and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of 40*l.* by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, &c.,) the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim *in order to avoid the estate.*† Yet, though strict words of condition be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives (as if an estate be granted by A to B, on condition that within two years B intermarry with C, and on failure thereof then to D and his heirs), this the law construes to be a limitation and not a *condition*: because if it were a condition, then, upon the breach thereof, only A or his representatives could avoid the estate by entry, and so D's remainder might be defeated by their neglecting to enter; but, when it is a limitation, the estate of B determines, and that of D commences, and he may enter on the lands the instant that the failure happens. So also, if a man by his will devises land to his heir at law, on condition that he pays a sum of money, and for non-payment devises it over, this shall be considered as a limitation; otherwise no advantage could be taken of the non-payment, for none but the heir himself could have entered for a breach of the condition.

In all these instances, of limitations or conditions subsequent, it is to be observed, that so long as the condition, either express or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold, provided the estate upon which such condition is annexed, be in itself of a freehold nature; as if the original grant express either an estate of inheritance, or for life; or no estate at all, which is constructively an estate for life. For, the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold; because the estate is capable to last for ever, or at least for the life of the tenant, supposing the condition to remain unbroken. But where

† See *Schulenberg v. Harriman*, 21 Wall. 44; *Nicoll v. Erie R. Co.*, 12 N. Y. 121.

the estate is at the utmost a chattel interest, which must determine at a time certain, and may determine sooner (as a grant for ninety-nine years, provided A, B, and C, or the survivor of them, shall so long live), this still continues a mere chattel, and is not, by such its uncertainty, ranked among estates of freehold.

These express conditions, if they be *impossible* at the time of their creation, or afterwards become impossible by the act of God or the act of the feoffor himself, or if they be *contrary to law*, or *repugnant* to the nature of the estate, are void.† In any of which cases, if they be conditions *subsequent*, that *is, [*157 to be performed after the estate is vested, the estate shall become absolute in the tenant. As if a feoffment be made to a man in fee-simple, on condition that unless he goes to Rome in twenty-four hours; or unless he marries with Jane S. by such a day (within which time the woman dies, or the feoffor marries her himself); or unless he kills another; or in case he aliens in fee; that then and in any of such cases the estate shall be vacated and determine: here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant. But if the condition be *precedent*, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant: for he hath no estate until the condition be performed.

There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are:—

III. Estates held *in vadio*, in *gage*, or pledge; which are of two kinds, *vivum vadium*, or living pledge; and *mortuum vadium*, dead pledge, or *mortgage*.

Vivum vadium, or living pledge, is when a man borrows a sum (suppose 200*l.*) of another; and grants him an estate, as of 20*l. per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living; it subsists, and survives the debt: and immediately on the discharge of that, results back to the borrower.

† See *Davis v. Gray*, 16 Wall. 203; 44 & 45 Vict. c. 41; see *ante*, p. 293, n. 7.

But *mortuum vadium*, a dead pledge, or *mortgage* (which is much more common than the other), is where a man borrows of another a specific sum (*e. g.* 200*l.*) *and grants him an estate in fee,† on condition that if he, the mortgagor, shall repay the mortgagee the said sum of 200*l.* on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge ; or, as is now the more usual way, that then the mortgagee shall re-convey the estate to the mortgagor : in this case, the land, which is so put in pledge, is by law, in case of non-payment at the time limited, for ever dead and gone from the mortgagor ; and the mortgagee's estate in the lands is then no longer conditional, but absolute. But, so long as it continues conditional, that is, between the time of lending the money, and the time allotted for payment, the mortgagee is called tenant in mortgage.⁴ But as it was formerly a doubt, whether, by taking

⁴ The statements in the text embody the common-law doctrine in regard to mortgages, as established at an early period in English jurisprudence. "A mortgage at common-law may be defined to be an estate created by a conveyance, absolute in its form, but intended to secure the performance of some act, such as the payment of money and the like, by the grantor or some other person, and to become void, if the act is performed agreeably to the terms prescribed at the time of making such conveyance. It is, therefore, an estate defeasible by the performance of a condition subsequent." (Washburn on Real Prop. ii. 36.) But in courts of equity, a different theory was established upon this subject. The debt was regarded as the principal thing, and the land as a mere pledge or security for the payment of the debt. The mortgagee was not deemed to be the owner of the land, but merely to have an interest therein of a personal nature, and a right of enforcing against it his claim, if the debt were not finally paid. Hence, by the common-law, the mortgagee, having an actual estate in the premises, might devise it by will, or it would descend to his heirs ; but in equity, the estate remained in the mortgagor, subject to the lien of the mortgage, and might be transferred to others, or would pass to his heirs, with this lien upon it. This distinction has caused a noteworthy diversity in the law of mortgages, as established in the different States of this country. In some States, the common-law doctrine has been made the basis of the law of mortgages therein prevailing ; while in others, the equitable theory has been substantially adopted, and is enforced even in courts of law. In still other States, there has been a process of amalgamation of the principles of law and of equity upon this subject, and they have been variously modified and combined so as to form one harmonious, composite system. And it should further be said that, in all the States, there has been to some extent such a process of assimilation of these diverse doctrines. The rigid theory of the old common-law is nowhere maintained without modification. Thus, though it is the

† In England, covenants for title are now implied in mortgages ; such covenants are usually inserted in this country. (44 & 45 Vict. c. 41.)

such estate in fee, it did not become liable to the wife's dower, and other incumbrances of the mortgagee (though that doubt has been long ago overruled by our courts of equity) it therefore became usual to grant only a long term of years by way of mortgage; with condition to be void on repayment of the mortgage-money: which course has been since pretty generally continued principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, whatever nature the mortgage may happen to be.

As soon as the estate is created, the mortgagee may immediately enter on the lands; but is liable to be dispossessed, upon performance of the condition by payment of the mortgage-money at the day limited.⁵ And therefore the usual way is to

established rule in some States that the mortgagee receives the freehold by the mortgage-deed, yet he is only regarded as *quasi-owner* as between himself and the mortgagor; and the latter is considered with reference to third persons, as owner of the estate, subject to the mortgage, and he may devise or grant it, and it will descend to his heirs, and it is generally made liable for the payment of his debts. By force of statute, established usage, or agreement in the mortgage, it is the almost invariable practice in all jurisdictions for the mortgagor to retain possession of the mortgaged premises until default of payment.

The equitable doctrine with reference to ordinary mortgages, which is above referred to, must be distinguished from the subject of equitable mortgages. These are mortgages which are only valid in courts of equity, but would not be so enforceable in courts of law. Thus, if a mortgage in the ordinary form be defective through non-observance of some requisite formality of execution, it may, nevertheless, be valid as an equitable mortgage. So an agreement to mortgage may be specifically enforced in equity, though not in law, and the execution of a mortgage required. Another form of equitable mortgage existing in England, and in some of the United States, is that "by deposit of title-deeds," as where a debtor deposits his title-deeds with the creditor as security for a loan. So the vendor of real estate is deemed generally in equity to have a lien upon the estate sold for the unpaid purchase-money, and this vendor's lien is virtually an equitable mortgage.

⁵ The condition upon which the land is conveyed is termed the "defeasance." It is not necessary that this should be inserted in the mortgage-deed, though this is the usual practice and is to be preferred. But if it be embodied in a separate instrument, this will be referred to the date of the principal deed, and they will be construed together. And even though a deed be absolute on its face, it is the general rule in courts of equity, that it may be shown, even by parol evidence, to have been intended by the parties as a mortgage, and it will be effectuated as such, in order that this intent may be fulfilled. In some States, this rule is applied even in courts of law.

agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now for ever dead. But here again the courts of equity interpose; and, *159] though a mortgage be thus forfeited, and the *estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate; paying to the mortgagee his principal, interest, and expenses: for otherwise, in strictness of law, an estate worth 1000*l.* might be forfeited for non-payment of 100*l.*, or a less sum. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption*:⁶ and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately; or else call upon the mortgagor to redeem his estate presently, or in default thereof, to be for ever *foreclosed* from redeeming the same; that is, to lose his equity of redemption without possibility of recall.⁷ And also, in some cases of fraudulent mortgages,

⁶ This right of redemption which the mortgagor possesses is, under the modern law of mortgages, a substantial right of property, constituting the mortgagor's estate or interest in the land, and measured in value by the worth of the premises over and above the mortgage incumbrance. The mortgagor may assign or devise it, mortgage it to another person, thus making a second mortgage upon the same property, or it will descend to his heirs. In like manner it will be subject to dower and curtesy, liable for debts, etc. Not only the mortgagor may redeem, but any person who obtains an interest in the land under the mortgagor after the making of the mortgage. (See *Bell v. New York*, 10 Paige, 49; *Grant v. Duane*, 9 Johns. 591; *Clark v. Reyburn*, 8 Wall. 318; *Newhall v. Lynn Bk.*, 101 Mass. 428.)

⁷ This form of foreclosure, which extinguishes the interest of the mortgagor in the land, and makes the mortgagee absolute owner of the property, is termed in law a "strict foreclosure." This is still the prevalent practice in the New England States. But a method of foreclosure by sale of the premises has been generally established in most of the other States, the proceeds of the

the fraudulent mortgagor forfeits all equity of redemption whatsoever. It is not however usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious, or small; or where the mortgagor neglects even the payment of interest: when the mortgagee is frequently obliged to bring an ejectment, and take the land into his own hands in the nature of a pledge, or the *pignus* of the Roman law: whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca*, which was, where the possession of the thing pledged remained with the debtor. But by statute 7 Geo. II. ch. 20, after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee can maintain no ejectment, but may be compelled to re-assign his securities. In Glanvil's time, when the universal method of conveyance was by livery of seizin *or corporal tradition of the lands, no gage or [*160 pledge of lands was good unless possession was also delivered to the creditor; "*si non sequatur ipsius vadii traditio, curia domini regis hujusmodi privatas conventiones tueri non solet*;" for which the reason given is, to prevent subsequent and fraudulent pledges of the same land: "*cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invadiari*." And the frauds which have arisen since the exchange of these public and notorious conveyances for more private and secret bargains, have well evinced the wisdom of our ancient law.⁸

sale being applied to the satisfaction of the mortgage debt, and the surplus, if any, returned to the mortgagor, or distributed among his other creditors. In some of these States, strict foreclosure may still be resorted to, though this is very uncommon. The forms of procedure in obtaining a foreclosure are generally prescribed in detail by statute. (See 43 N. Y. 469; 130 U. S. 43.)

It is also a frequent practice to insert in a mortgage-deed a power of sale, which empowers the mortgagee to sell the premises, in case there is default of payment, and use the avails thus obtained for the liquidation of the debt. This affords a prompt and efficacious remedy, without the necessity of instituting formal proceedings for a foreclosure. This remedy, however, is cumulative, and the mortgage may be foreclosed in the regular way, if desired. The terms of the power of sale must be strictly complied with; and if additional regulations are prescribed by statute (as is sometimes the case) in regard to the method or time of sale, etc., these must also be carefully observed. (See *Fencks v. Alexander*, 11 Paige, 619; *Lawrence v. Farmers' Loan & Trust Co.*, 13 N. Y. 200, 642; also 92 U. S. 142; 135 Mass. 306.)

⁸ (Upon the subject of mortgages may be consulted, Washburn on Real Estate, 2d volume; Jones on Mortgages; Kent's Commentaries, lecture lviii.; and Coote on Mortgages.)

IV. A fourth species of estates, defeasible on condition subsequent, are those held by *statute merchant*, and *statute staple*; which are very nearly related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the statute 13 Edw. I. *de mercatoribus*, and thence called a statute merchant; the other pursuant to the statute 27 Edw. III. ch. 9 before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns, from whence this security is called a statute staple. They are both, I say, securities for debts acknowledged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be satisfied; and, during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognizance in the nature of a statute staple, acknowledged before either of the chief justices, or (out of term) before their substitutes, the mayor of the staple at Westminster and the recorder of London; whereby the benefit of this mercantile transaction is extended to all the king's subjects in general, by virtue of the statute 23 Hen. VIII. ch. 6, amended by 8 Geo. I. ch. 25, which directs such recognizances to be enrolled and certified into chancery. But these by the statute of frauds, 29 Car. II. ch. 3, are only binding upon the lands in the hands of *bona fide* purchasers, from the day of their enrollment, which is ordered to be marked on the record.

V. Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called an *estate *161] by *elegit*. What an *elegit* is, and why so called will be explained in the third part of these commentaries. At present I need only mention, that it is the name of a writ, founded on the statute of Westm. 2, by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one half of the defendant's lands and tenements, to be occu-

pied and enjoyed until his debt and damages are fully paid : and during the time he so holds them, he is called tenant by *elegit*. It is easy to observe, that this is also a mere conditional estate, defeasible as soon as the debt is levied. But it is remarkable that the feudal restraints of alienating lands, and charging them with the debts of the owner, were softened much earlier and much more effectually for the benefit of trade and commerce, than for any other consideration. Before the statute of *quia emptores*, it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them : the statute therefore of Westm. 2, permits only so much of them to be affected by the process of law, as a man was capable of alienating by his own deed. But by the statute *de mercatoribus* (passed in the same year) the whole of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade ; though one *half* of them was liable to be taken in execution for any other debt of the owner.⁹

I shall conclude what I had to remark of these estates, by statute merchant, statute staple, and *elegit*, with the observation of Sir Edward Coke. " These tenants have uncertain interests in lands and tenements, and yet they have but chattels and no freeholds ;" (which makes them an exception to the general rule) " because though they may hold an estate of inheritance, or for life, *ut liberum tenementum*, until their debt be paid ; yet it shall go to their executors : for *ut* is similitudinary ; and though to recover their estates, they shall have the same remedy (by assize) as a tenant of the freehold shall have, yet it is but the *similitude of a freehold, and *nullum simile est idem*." [*162

⁹ The forms of security for debt by statute merchant and statute staple are now entirely disused in England, and the remedy by writ of *elegit*, which has been considerably extended in its scope, has now taken their place. By the English law, as it now stands, the whole of a debtor's lands may be applied to the satisfaction of his debts, instead of the half, as formerly. In the United States, there are none of these peculiar estates in existence, except *elegit* in one or two States. There are statutory provisions in the several States, providing for the application of a debtor's real estate to the satisfaction of his indebtedness. As a general rule, the real estate is only resorted to for this purpose when the personal property, which is first applied, has been found insufficient. The usual method is to sell the real property, and pay the proceeds to the creditors ; but in some States, the property itself is divided among the creditors, if in its nature susceptible of division.

This indeed only proves them to be chattel interests, because they go to the executors, which is inconsistent with the nature of a freehold ; but it does not assign the reason why these estates, in contradistinction to other uncertain interests, shall vest in the executors of the tenant and not the heir ; which is probably owing to this ; that, being a security and remedy provided for personal debts due to the deceased, to which debts the executor is entitled, the law has therefore thus directed their succession ; as judging it reasonable from a principle of natural equity, that the security and remedy should be vested in those to whom the debts if recovered would belong. For, upon the same principle, if lands be devised to a man's executor, until out of the profits the debts due from the testator be discharged, this interest in the lands shall be a chattel interest, and on the death of such executor shall go to *his* executors : because they, being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund out of which he has directed them to be paid.¹⁰

CHAPTER XI.

[BL. COMM.—BOOK II. CH. XI.]

Of Estates in Possession, Remainder and Reversion.

HITHERTO we have considered estates solely with regard to their duration, or the *quantity of interest* which the owners have therein. We are now to consider them in another view ; with regard to the *time of their enjoyment*, when the actual pernity of the profits (that is, the taking, perception, or receipt, of the rents and other advantages arising therefrom) begins. Estates therefore with respect to this consideration, may either be in *possession*, or in *expectancy* : and of expectancies there are two sorts ; one created by the act of the parties, called a *remainder* ; the other by act of law, and called a *reversion*.

I. Of estates in *possession* (which are sometimes called estates *executed*, whereby a present interest passes to and resides

¹⁰ By statute 1 Vict. c. 26, s. 30, the executor now takes the fee by such a devise, unless the will limits to him a less estate. (See *post*, p. 604, n. 11.)

in the tenant, not depending on any subsequent circumstance or contingency, as in the case of estates *executory*), there is little or nothing peculiar to be observed. All the estates we have hitherto spoken of are of this kind ; for, in laying down general rules, we usually apply them to such estates as are then actually in the tenant's possession. But the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the English law. These will therefore require a minute discussion, and demand some degree of attention.

II. An estate then in *remainder* may be defined to be, an estate limited to take effect and be enjoyed after another estate is determined.¹ *As if man seized in fee-simple granteth [*164 lands to A for twenty years, and, after the determination of the said term, then to B and his heirs for ever : here A is tenant for years, remainder to B in fee. In the first place an estate for years is created or carved out of the fee, and given to A ; and the residue or remainder of it is given to B. But both these interests are in fact only one estate ; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee. There are indeed different *parts*, but they constitute only one whole : they are carved out of one and the same inheritance: they are both created, and may both subsist, together ; the one in possession, the other in expectancy. So if land be granted to A for twenty years, and after the determination of the said term to B for life ; and after the determination of B's estate for life, it be limited to C and his heirs for ever : this makes A tenant for years, with remainder to B for life, remainder over to C in fee. Now here the estate of inheritance undergoes a division into three portions : there is first A's estate for years carved out of it ; and after that B's estate for life ; and then the whole that remains is limited to C and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only ; being nothing but parts or portions of one entire inheritance: and if there were a hundred remainders, it would still be the same thing : upon a principle grounded in mathematical truth, that all the parts are equal, and

¹The common-law principles upon the subject of remainders, which are admirably set forth in this chapter, still form the basis of the law upon this subject, but have been to a considerable extent modified by modern statutes. The statute-books of each State should therefore be consulted in this connection. (See Washburn on Real Prop. II. 641-645, 5th ed.; 6 Wall. 458; 79 Me. 381; 143 Mass. 237, 389; 103 N. Y. 453.)

no more than equal, to the whole. And hence also it is easy to collect, that no remainder can be limited after the grant of an estate in fee-simple : because a fee-simple is the highest and largest estate that a subject is capable of enjoying ; and he that is tenant in fee hath in him the *whole* of the estate : a remainder therefore, which is only a portion, or residuary *part*, of the estate, cannot be reserved after the whole is disposed of. A particular *165] estate, with all *the remainders expectant thereon, is only one fee-simple : as 40*l.* is part of 100*l.* and 60*l.* is the remainder of it : wherefore, after a fee-simple once vested, there can no more be a remainder limited thereon, than, after the whole 100*l.* is appropriated, there can be any residue subsisting.

Thus much being premised, we shall be better enabled to comprehend the rules that are laid down by law to be observed in the creation of remainders, and the reasons upon which those rules are founded.

1. And, first, there must necessarily be some particular estate precedent to the estate in remainder. As, an estate for years to A, remainder to B for life ; or, an estate for life to A, remainder to B in tail. This precedent estate is called the *particular* estate, as being only a small part or *particula*, of the inheritance ; the residue or remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason ; that *remainder* is a relative expression, and implies that some part of the thing is previously disposed of : for where the whole is conveyed at once, there cannot possibly exist a remainder ; but the interest granted, whatever it be, will be an estate in possession.

An estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder ; it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interests, which were considered in the light of mere contracts by the ancient law, to be executed either now or hereafter, as the contracting parties should agree ; but an estate of freehold must be created to commence immediately. For it is an ancient rule of the common law, that an estate of freehold cannot be created to commence *in futuro* ; but it ought to take effect presently either in possession *166] or remainder ; because at *common law no freehold in lands

could pass without livery of seizin ; which must operate either immediately, or not at all. ' It would therefore be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession. Therefore, though a lease to A for seven years, to commence from next Michaelmas, is good ; yet a conveyance to B of lands, to hold to him and his heirs for ever from the end of three years next ensuing, is void. So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed ; and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As, where one leases to A for three years, with remainder to B in fee, and makes livery of seizin to A ; hereby the livery of the freehold is immediately created, and vested in B, during the continuance of A's term of years. The whole estate passes at once from the grantor to the grantees and the remainder-man is seized of his remainder at the same time that the termor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter ; but it is to all intents and purposes an estate commencing *in præsenti*, though to be occupied and enjoyed in *futuro*.

As no remainder can be created without such a precedent particular estate, therefore the particular estate is said to *support* the remainder. But a lease at will is not held to be such a particular estate as will support a remainder over. For an estate at will is of a nature so slender and precarious, that it is not looked upon as a portion of the inheritance ; and a portion must first be taken out of it, in order to constitute a remainder. Besides, if it be a freehold remainder, livery of seizin must be given at the time of its creation ; and the entry of the grantor to do this determines the estate at will *in the very instant in [*167 which it is made : or if the remainder be a chattel interest, though perhaps the deed of creation might operate as a *future contract*, if the tenant for years be a party to it, yet it is void by way of *remainder* : for it is a separate independent contract, distinct from the precedent estate at will ; and every remainder

must be part of one and the same estate, out of which the preceding particular estate is taken. And hence it is generally true, that if the particular estate is void in its creation, or by any means is defeated afterwards, the remainder supported thereby shall be defeated also : as where the particular estate is an estate for the life of the person not *in esse* ; or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate ; in either of these cases the remainder over is void.

2. A second rule to be observed is this : that the remainder must commence or pass out of the grantor at the time of the creation of the particular estate. As, where there is an estate to A for life, with remainder to B in fee : here B's remainder in fee passes from the grantor at the same time that seizin is delivered to A of his life estate in possession. And it is this which induces the necessity at common law of livery of seizin being made on the particular estate, whenever a *freehold* remainder is created. For, if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seizin, in order to convey the freehold from and out of the grantor, otherwise the remainder is void. Not that the livery is necessary to strengthen the estate for years ; but, as livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder without infringing the possession of the lessee for years, therefore the law allows such livery, made to the tenant of the particular estate, to relate and enure to him in remainder, as both are but one estate in law.

*168] *3. A third rule respecting remainders is this : that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines. As, if A be tenant for life, remainder to B in tail : here B's remainder is vested in him, at the creation of the particular estate to A for life : or if A and B be tenants for their joint lives, remainder to the survivor in fee ; here, though during their joint lives, the remainder is vested in neither, yet on the death of either of them, the remainder vests instantly in the survivor ; wherefore both these are good remainders. But, if an estate be limited to A for life, remainder to the eldest son of B in tail, and A dies before B hath any son ; here the remainder will be void, for it did not vest in any one during the continuance, nor at the determin-

ation, of the particular estate: and even supposing that B should afterwards have a son, he shall not take by this remainder; for, as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone for ever. And this depends upon the principle before laid down, that the precedent particular estate, and the remainder, are one estate in law; they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate, or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate, and the remainder supported thereby: the thing supported must fall to the ground, if once its support be severed from it.†

It is upon these rules, but principally the last, that the doctrine of *contingent* remainders depends. For remainders are either *vested* or *contingent*. *Vested* remainders (or remainders *executed*, whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person, after the *particular es- [*169 tate is spent. As if A be tenant for twenty years, remainder to B in fee; here B's is a vested remainder, which nothing can defeat, or set aside.

Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious and *uncertain event*; so that the particular estate may chance to be determined, and the remainder never take effect.

First, they may be limited to a dubious and uncertain *person*. As if A be tenant for life, with remainder to B's eldest son (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B will have a son or no: but the instant that a son is born, the remainder is no longer contingent, but vested. Though, if A had died before the contingency happened, that is, before B's son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A were tenant for life, remainder to his own eldest son in tail, and A died without issue born, but leaving his wife *enceinte*, or big with child, and after his death a posthumous son was born, this son could not take the land by virtue of this remainder; for the particular

† But in England, the remainder may now be good as a springing or shifting use or an executory devise. (40 & 41 Vict. c. 33.) A similar rule prevails in some of the United States.

estate determined before there was any person *in esse*, in whom the remainder could vest. But, to remedy this hardship, it is enacted by statute 10 & 11 Wm. III., ch. 16, that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime: that is, the remainder is allowed to vest in them, while yet in their mother's womb.

This species of contingent remainders to a person not in being, must however be limited to some one, that may, by common possibility, or *potentia propinqua*, be *in esse* at or before the *170] particular estate determines. As if an estate be * made to A for life, remainder to the heirs of B; now, if A dies before B, the remainder is at an end; for during B's life he has no heir, *nemo est haeres viventis*: but if B dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder, for the possibility of B's dying before A is *potentia propinqua*, and therefore allowed in law. But a remainder to the right heirs of B (if there be no such person as B *in esse*) is void. For here there must two contingencies happen: first, that such a person as B shall be born; and, secondly, that he shall also die during the continuance of the particular estate; which makes it *potentia remotissima*, a most improbable possibility. A remainder to a man's eldest son, who hath none (we have seen) is good, for by common possibility he may have one; but if it be limited in particular to his son John, or Richard, it is bad, if he have no son of that name; for it is too remote a possibility that he should not only have a son, but a son of a particular name.† A limitation of a remainder to a bastard before it is born, is not good: for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. Thus may a remainder be contingent, on account of the uncertainty of the *person* who is to take it.²

A remainder may also be contingent, where the person to

† This would now be deemed a good remainder. (Washburn on Real Prop. II. 630, 5th ed.)

² [This rule with respect to illegitimate children is not founded on any notion of the improbability of the event of such children being born, but rather on the policy of the law, and the maxim that a bastard cannot with certainty be ascertained to be the issue of a particular man, and can only take, as such, under a gift made after he has become known by reputation as the child of that man.]

whom it is limited is fixed and certain, but the *event* upon which it is to take effect is vague and uncertain. As, where land is given to A for life, and in case B survives him, then with remainder to B in fee: here B is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A and B it is contingent; and if B dies first, it never can vest in his heirs, but is forever gone; but if A dies first, the remainder to B becomes vested.

*Contingent remainders of either kind, if they amount [*171 to a freehold, cannot be limited on an estate for *years*, or any other particular estate, *less* than a freehold. Thus if land be granted to A for ten years, with remainder in fee to the right heirs of B, this remainder is void; but if granted to A *for life*, with a like remainder, it is good. For, unless the freehold passes out of the grantor at the time the remainder is created, such freehold remainder is void: it cannot pass out of him without vesting somewhere; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest no where; unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

Contingent remainders may be *defeated*, by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested. Therefore when there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life-estate before any of those remainders vest: the consequence of which is, that he utterly defeats them all. As, if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life-estate, he by that means defeats the remainder in tail to his son; for his son not being *in esse*, when the particular estate determined, the remainder could not then vest; and, as it could not vest then, by the rules before laid down, it never can vest at all. In these cases therefore it is necessary to have trustees appointed to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his estate determines. If therefore his estate for life de-

termines otherwise than by his death, the estate of the trustees, for the residue of his natural life, will then take effect, and be *172] come a *particular estate in possession, sufficient to support the remainders depending in contingency. This method is said to have been invented by Sir Orlando Bridgman, Sir Geoffrey Palmer, and other eminent counsel, who betook themselves to conveyancing during the time of the civil wars; in order thereby to secure in family settlements a provision for the future children of an intended marriage, who before were usually left at the mercy of the particular tenant for life; and when, after the Restoration, these gentlemen came to fill the first offices of the law, they supported this invention within reasonable and proper bounds, and introduced it into general use.

Thus the student will observe how much nicety is required in creating and securing a remainder; and I trust he will in some measure see the general reasons upon which this nicety is founded. It were endless to attempt to enter upon the particular subtleties and refinements, into which this doctrine, by the variety of cases which have occurred in the course of many centuries, has been spun out and subdivided: neither are they consonant to the design of these elementary disquisitions. I must not however omit, that in devises by last will and testament (which being often drawn up when the party is *inops consilii*, are always more favored in construction than formal deeds, which are presumed to be made with great caution, forethought, and advice), in these devises, I say, remainders may be created in some measure contrary to the rules before laid down: though our lawyers will not allow such dispositions to be strictly remainders; but call them by another name, that of *executory devises*, or devises hereafter to be executed.

An executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency. It differs from a remainder in three very material points; 1. That it needs not any *173] *particular estate to support it. 2. That by it a fee-simple, or other less estate, may be limited after a fee-simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same.

1 The first case happens when a man devises a future estate to arise upon a contingency; and, till that contingency happens,

does not dispose of the fee-simple, but leaves it to descend to his heirs at law. As if one devises land to a feme-sole and her heirs, upon her day of marriage : here is in effect a contingent remainder, without any particular estate to support it ; a freehold commencing *in futuro*. This limitation, though it would be void in a deed, yet is good in a will, by way of executory devise. For, since by a devise a freehold may pass without corporeal tradition or livery of seizin (as it must do if it passes at all), therefore it may commence *in futuro* ; because the principal reason why it cannot commence *in futuro* in other cases, is the necessity of actual seizin, which always operates *in præsenti*. And, since it may thus commence *in futuro*, there is no need of a particular estate to support it ; the only use of which is to make the remainder, by its unity with the particular estate, a present interest. And hence also it follows, that such an executory devise, not being a present interest, cannot be barred by a recovery, suffered before it commences.

2. By executory devise, a fee, or other less estate, may be limited after a fee. And this happens where a deviser devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises land to A and his heirs ; but if he dies before the age of twenty-one, then to B and his heirs ; this remainder, though void in deed, is good by way of executory devise. But, in both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time ; as within one or more life or lives in being, or within a *moderate term of years, for [*174 courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors : because by perpetuities (or the settlement of an interest, which shall go in the succession prescribed, without any power of alienation), estates are made incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established. The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are devised to such unborn son of a feme-covert, as shall first attain the age of twenty-one, and his heirs, the utmost length of time that can happen before the estate can vest, is the life of the

mother and the subsequent infancy of her son : and this hath been decreed to be a good executory devise.

3. By executory devise a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed ; for by law the first grant of it, to a man for life, was a total disposition of the whole term ; a life estate being esteemed of a higher and larger nature than any term of years. And, at first, the courts were tender, even in the case of a will, of restraining the devisee for life from aliening the term ; but only held, that in case he died without exerting that act of ownership, the remainder over should then take place : for the restraint of the power of alienation, especially in very long terms, was introducing a species of perpetuity. But, soon afterwards, it was held, that the devisee for life hath no power of aliening the term, so as to bar the remainder-man : yet, in order to prevent the danger of perpetuities, it was settled that though such remainders may be limited to as many persons successively as the deviser thinks proper, yet they must all be *175] **in esse* during the life of the first devisee ; for then all the candles are lighted and are consuming together, and the ultimate remainder is in reality only to that remainder-man who happens to survive the rest : and it was also settled, that such remainder may not be limited to take effect, unless upon such contingency as must happen (if at all) during the life of the first devisee.⁸

⁸ A noted case, illustrative of the doctrine of perpetuities, was that of Peter Thelusson, who “ devised the bulk of an immense property to trustees for the purpose of accumulation during the lives of three sons, and of all their sons who should be living at the time of his death, or be born in due time afterwards, and during the life of the survivor of them. Upon the death of this last, the fund was directed to be divided into three shares, one to go to the eldest male lineal descendant of each of his three sons ; upon the failure of such a descendant, the share to go to the descendants of the other sons ; and, upon the failure of all such descendants, the whole to go to the sinking fund. When he died he had three sons living, who had four sons living, and two twin sons were born soon after. Upon calculation it appeared that, upon the death of the survivor of these nine, the fund would probably exceed nineteen millions ; and upon the supposition of only one person to take, and a minority of ten years, that it would exceed thirty-two millions. It is evident that this extraordinary rule was strictly within the limits laid down in the text, and it was accordingly sustained. But this occasioned the passage of a statute (39 & 40 Geo. III., ch. 98) prohibiting any settlements of property for accumulation for any longer term than the life of the settler,

Thus much for such estates in expectancy as are created by the express words of the parties themselves ; the most intricate title in the law. There is yet another species, which is created by the act and operation of the law itself, and this is called a reversion.

III. An estate in *reversion* is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. Sir Edward Coke describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reversion of the fee is, without any special reservation, vested in the donor by act of law : and so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee-simple of all lands must abide somewhere ; and if he, who was before possessed of the whole, carves out of it any smaller estate and grants it away, whatever is not so granted remains in him. A reversion is never, therefore, created by deed or writing, but arises from construction of law ; a remainder can never be limited, unless by either deed or devise. But both are equally transferable, when actually vested, being both estates *in præsentī*, though taking effect *in futuro*.

The doctrine of reversions is plainly derived from the feudal constitution. For when a feud was granted to a man for life; or to him and his issue male, rendering either rent or other services ; then, on his death or the failure of issue male, the feud was determined, and resulted back to the *lord or proprietor, [*176 to be again disposed of at his pleasure. And hence the usual incidents to reversions are said to be *fealty* and *rent*. When no rent is reserved on the particular estate, fealty however

the period of 21 years from his death, the minority of any person or persons living, or *en ventre sa mère* at the time of his death, or the minority of any persons who would be beneficially entitled to the profits under the settlement, if of full age."

In the various States of this country, there are also statutes against perpetuities, or the common-law rule has been adopted upon the subject. The common-law prohibited the suspension of the power of alienation of real property for a longer period than any number of lives in being, and twenty-one years and the ordinary period of gestation thereafter. In New York, there can be no suspension for a longer period than two lives in being, and sometimes a minority in addition. The persons whose lives are taken as the measure of duration should be mentioned, or definitely referred to in the grant or instrument of conveyance. (*Manice v. Manice*, 43 N. Y. 303; see 113 U. S. 340; 112 N. Y. 167 & 299.)

results of course, as an incident quite inseparable, and may be demanded as a badge of tenure, or acknowledgment of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident, though not inseparably so, to the reversion. The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent; by *special* words: but by a *general* grant of the reversion the rent will pass with it, as incident thereunto; though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not *e converso*: for the maxim of law is "*accessorium non ducit, sed sequitur, suum principale.*"

These *incidental* rights of the reversioner, and the respective modes of descent, in which remainders very frequently differ from reversions, have occasioned the law to be careful in distinguishing the one from the other, however inaccurately the parties themselves may describe them. For if one seized of a paternal estate in fee, makes a lease for life, with remainder to himself and his heirs, this is properly a mere reversion to which rent and fealty shall be incident; and which shall only descend to the heirs of his father's blood, and not to his heirs general, as a remainder limited to him by a third person would have done: for it is the old estate, which was originally in him, and never yet was out of him. And so likewise, if a man grants a lease for life to A, reserving rent, with reversion to B and his heirs, B hath a remainder descendible to his heirs general, and not a reversion to which the rent is incident; but the grantor shall be entitled to the rent, during the continuance of A's estate. *177] *In order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealments of their death, it is enacted by the statute 6 Ann., c. 18 that all persons on whose lives any lands or tenements are holden, shall (upon application to the court of chancery, and order made thereupon), once in every year, if required, be produced to the court, or its commissioners; or upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements, till the party shall appear to be living.

Before we conclude the doctrine of remainders and rever*

sions, it may be proper to observe, that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be *merged*, that is, sunk or drowned in the greater. Thus, if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has a term in right of another (*en autre droit*), there is no merger. Therefore, if tenant for years dies, and makes him who has the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he has the fee in his own right, and the term of years in the right of the testator, and subject to his debts and legacies. So also, if he who has the reversion in fee marries the tenant for years, there is no merger; for he has the inheritance in his own right, the lease in the right of his wife. An estate-tail is an exception to this rule: for a man may have in his own right both an estate-tail and a reversion in fee: and the estate-tail, though a less estate, shall not merge in the fee. For estates-tail are protected and preserved from merger by the *operation and [*178 construction, though not by the express words, of the statute *de donis*: which operation and construction have probably arisen upon this consideration: that, in the common cases of *merger* of estates for life or years by uniting with the inheritance, the particular tenant has the sole interest in them, and has full power at any time to defeat, destroy or surrender them to him that has the reversion; therefore when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate. But, in an estate-tail, the case is otherwise: the tenant for a long time had no power at all over it, so as to bar or destroy it, and now can only do it by certain special modes, by a fine, a recovery, and the like: it would therefore have been strangely improvident to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue; and hence it has become a maxim, that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee.

CHAPTER XII.

[BL. COMM.—BOOK II. CH. XII.]

Of Estates in Severalty, Joint-tenancy, Coparcenary, and Common

WE come now to treat of estates, with respect to the number and connections of their owners, the tenants who occupy and hold them. And, considered in this view, estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held in four different ways; in severalty, in joint-tenancy, in coparcenary, and in common.

I. He that holds lands or tenements in *severalty*, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. This is the most common and usual way of holding an estate; and therefore we may make the same observations here, that we did upon estates in possession, as contradistinguished from those in expectancy, in the preceding chapter: that there is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and that in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. I shall therefore proceed to consider the other three species of estates, in which there are always a *plurality* of tenants.

***180]** *II. An estate in *joint-tenancy* is where lands or tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will. In consequence of such grants an estate is called an estate in joint-tenancy, and sometimes an estate in *jointure*, which word as well as the other signifies an union or conjunction of interest; though in common speech the term *jointure* is now usually confined to that joint-estate, which by virtue of the statute 27 Hen. VIII. ch. 10, is

frequently vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower.¹

In unfolding this title, and the two remaining ones, in the present chapter, we will first inquire how these estates may be *created*; next, their *properties* and respective *incidents*; and lastly, how they may be *severed* or *destroyed*.

1. The *creation* of an estate in joint-tenancy depends on the wording of the deed or devise, by which the tenants claim title: for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint-tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all other respects. For,

2. The *properties* of a joint estate are derived from its unity, which is fourfold; the unity of *interest*, the unity of *title*, the unity of *time*, and the unity of *possession*; or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

* *First*, they must have one and the same *interest*. One [*181 joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other in tail. But if land be limited to A and B for their lives, this makes them joint-tenants of the freehold; if to A and B and their heirs, it makes them joint-tenants of the

¹ Joint-tenancy was favored in the early common law, by reason of certain advantages growing out of this mode of tenure when the feudal system was in force; but at the present day, the tendency of legislation in this country is to abolish it, and convert limitations of estates to two or more persons into tenancies in common, unless the grantees are joint-executors or joint-trustees, or unless it is expressly declared by the deed that the estate shall be held in joint-tenancy. This change has been made because the doctrine of survivorship, incident to such estates, is regarded as unreasonable and burdensome.

inheritance. If land be granted to A and B for their lives, and to the heirs of A ; here A and B are joint-tenants of the freehold during their respective lives, and A has the remainder of the fee in severalty ; or if land be given to A and B, and the heirs of the body of A ; here both have a joint estate for life, and A hath a several remainder in tail. *Secondly*, joint-tenants must also have a unity of *title* ; their estate must be created by one and the same act, whether legal or illegal ; as by one and the same grant, or by one and the same disseizin. Joint-tenancy cannot arise by descent or act of law ; but merely by purchase or acquisition by the act of the party : and, unless that act be one and the same, the two tenants would have different titles ; and if they had different titles, one might prove good and the other bad, which would absolutely destroy the jointure. *Thirdly*, there must also be a unity of *time* ; their estates must be vested at one and the same period as well as by one and the same title. As in case of a present estate made to A and B ; or a remainder in fee to A and B after a particular estate ; in either case A and B are joint-tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder be limited to the heirs of A and B ; and during the continuance of the particular estate A dies, which vests the remainder of one moiety in his heir : and then B dies, whereby the other moiety becomes vested in the heir of B : now A's heir and B's heir are not joint-tenants of this remainder, but tenants in common ; for one moiety vested *182] at one time, and the other moiety vested at another. *Yet where a feoffment was made to the use of a man, and such wife as he should afterwards marry, for term of their lives, and he afterwards married ; in this case it seems to have been held that the husband and wife had a joint-estate, though vested at different times ; because the *use* of the wife's estate was in abeyance and dormant till the intermarriage ; and, being then awakened, had relation back, and took effect from the original time of creation. Lastly, in joint-tenancy there must be a unity of *possession*. Joint-tenants are said to be seized *per my et per tout*, by the *half* or *moiety*, and by *all* : that is, they each of them have the entire possession, as well of every *parcel* as of the *whole*. They have not, one of them a seizin of one half or moiety, and the other of the other moiety ; neither can one be exclu-

sively seized of one acre, and his companion of another ; but each has an undivided moiety of the whole, and not the whole of an undivided moiety. And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common, for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seized of the entirety, *per tout, et non per my*: the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.†

Upon these principles, of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenant's estate. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint-reversion. If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity, or relation of their estate. On the same reason, livery of seizin, made to one joint-tenant, shall enure to both of them : and the entry, or re-entry, of one joint-tenant is as effectual in law as if it were the act of both. In all actions also relating to their joint-estate, one joint-tenant cannot sue or be sued without joining the other. * * * * Upon the same ground it is held, that one joint-tenant cannot have an action against another for trespass, in respect of his land ; for each has an equal right to enter on any part of it. But one joint-tenant is not capable by himself to do any act, which may tend to defeat or injure the estate of the other ; as to let leases, or to grant copyholds : and if any waste be done, which tends to the destruction of the inheritance, one joint-tenant may have an action of waste against the other ; by construction of the statute Westm. 2. ch. 22. So, too, though at common law no action of account lay for one joint-tenant against another, unless he had constituted him his bailiff or receiver, yet now by the statute, 4 Ann. ch. 16, joint-tenants may have actions of account against each other, for receiving more than their due share of the profits of the tenements held in joint-tenancy.²

From the same principle also arises the remaining grand incident of joint-estates ; *viz.*, the doctrine of *survivorship* ; by

† As to estates by the entirety, see 100 N. Y. 12; 117 Pa. St. 213. But husband and wife may also be tenants in common. (128 U. S. 464.)

² The action of account is now obsolete.

which when two or more persons are seized of a joint estate, of inheritance, for their own lives, or *pur autre vie*, or are jointly possessed of any chattel-interest, the entire tenancy, upon the decease of any of them, remains to the survivors, and at length to the last survivor ; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate. This is the natural and regular consequence of the union and entirety of their interest. The *184] interest of two joint-tenants, *is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other ; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the joint-tenancy instantly ceases. But, while it continues, each of two joint-tenants has a concurrent interest in the whole ; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally had is clearly not divested by the death of his companion ; and no other person can now claim to have a *joint* estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own ; neither can any one claim a *separate* interest in any part of the tenements ; for that would be to deprive the survivor of the right which he has in all, and every part. As therefore the survivor's original interest in the whole still remains ; and as no one can now be admitted, either jointly or severally, to any share with him therein ; it follows, that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.

This right of survivorship is called by our ancient authors the *jus accrescendi*, because the right upon the death of one joint-tenant accumulates and increases to the survivors ; or, as they themselves express it, "*pars illa communis accrescit superstitibus, de persona in personam, usque ad ultimam superstitem.*" And this *jus accrescendi* ought to be mutual ; which I apprehend to be one reason why neither the king, nor any corporation, can be a joint-tenant with a private person. For here is no mutuality : the private person has not even the remotest chance of being seized of the entirety, by benefit of survivorship ; for the king and the corporation can never die.

* 3. We are, lastly, to inquire how an estate in joint- [*185
tenancy may be *severed* and *destroyed*. And this may be done
by destroying any of its constituent unities. 1. That of *time*,
which respects only the original commencement of the joint-
estate, cannot indeed (being now past) be affected by any sub-
sequent transactions. But, 2. The joint-tenants' estate may be
destroyed, without any alienation, by merely disuniting their
possession. For joint-tenants being seized *per my et per tout*,
everything that tends to narrow that interest, so that they shall
not be seized throughout the whole, and throughout every part,
is a severance or destruction of the jointure. And, therefore, if
two joint-tenants agree to part their lands, and hold them in
severalty, they are no longer joint-tenants: for they have now
no joint-interest in the whole, but only a several interest respect-
ively in the several parts. And for that reason also, the right
of survivorship is by such separation destroyed. By common
law all the joint-tenants might agree to make partition of the
lands, but one of them could not compel the other so to do: for
this being an estate originally created by the act and agreement
of the parties, the law would not permit any one or more of
them to destroy the united possession without a similar universal
consent. But now by the statutes 31 Hen. VIII., ch. 1, and 32
Hen. VIII., ch. 32, joint-tenants, either of inheritances or other
less estates, are compellable by writ of partition to divide their
lands.⁸ 3. The jointure may be destroyed by destroying the
unity of *title*. As if one joint-tenant alienes and conveys his
estate to a third person: here the joint-tenancy is severed, and
turned into tenancy in common; for the grantee and the remain-
ing joint-tenant hold by different titles (one derived from the
original, the other from the subsequent, grantor), though, till
partition made, the unity of possession continues. But a devise
of one's share by will *is no severance of the jointure [*186
for no testament takes effect till after the death of the
testator, and by such death the right of the survivor (which
accrued at the original creation of the estate, and has therefore

⁸ These statutes have been superseded in England by later enactments, prescribing particular methods of procedure to obtain partition. In the various States of this country, also, statutes have been enacted, providing for the partition of estates held in joint-tenancy, or tenancy in common.

a priority to the other, is already vested. 4. It may also be destroyed by destroying the unity of *interest*. And therefore, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure; though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance; because, being created by one and the same conveyance, they are not separate estates (which is requisite in order to a merger), but branches of one entire estate. In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure: for it destroys the unity both of title and of interest. And, whenever or by whatever means the jointure ceases or is severed, the right of survivorship, or *jus accrescendi*, the same instant ceases with it. Yet, if one of the three joint-tenants alienes his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship: and if one of the three joint-tenants release his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure; for they still preserve their original constituent unities. But when, by any act or event, different interests are created in the several parts of the estate, or they are held by different titles, or if merely the possession is separated; so that the tenants have no longer these four indispensable properties, a sameness of interest, and undivided possession, a title vesting at one and the same time, and by one and the same act or grant; the jointure is instantly dissolved.

*187] * In general it is advantageous for the joint-tenants to dissolve the jointure; since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes, however, it is disadvantageous to dissolve the joint-estate; as if there be joint-tenants for life, and they make partition, this dissolves the jointure, and, though before they each of them had an estate in the whole for their own lives and the life of their companion, now they have an estate in a moiety only for their own lives merely; and, on the death of either, the reversioner shall enter on his moiety. And, therefore, if there be two joint-tenants for life, and one grants away his part

for the life of his companion, it is a forfeiture: for, in the first place, by the severance of the jointure he has given himself in his own moiety only an estate for his own life; and then he grants the same land for the life of another; which grant, by a tenant for his own life merely, is a forfeiture of his estate; for it is creating an estate which may by possibility last longer than that which he is legally entitled to.

III. An estate held in *coparcenary* is where lands of inheritance descend from the ancestor to two or more persons.⁴ It *arises* either by common law or particular custom. By common law: as where a person seized in fee-simple or in fee-tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives: in this case they shall all inherit, as will be more fully shown when we treat of descents hereafter; and these co-heirs are then called *coparceners*; or, for brevity, *parceners* only. Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c. And, in either of these cases, all the parceners put together make but one heir, and have but one estate among them.

*The *properties* of parceners are in some respects like [*188 those of joint-tenants; they having the same unities of *interest*, *title*, and *possession*. They may sue and be sued jointly for matters relating to their own lands; and the entry of one of them shall in some cases enure as the entry of them all. They cannot have an action of trespass against each other: but herein they differ from joint-tenants, that they are also excluded from maintaining an action of waste; for coparceners could at all times put a stop to any waste by writ of partition, but till the statute of Henry the Eighth joint-tenants had no such power. Parceners also differ materially from joint-tenants in four other points. 1. They always claim by descent, whereas joint-tenants always claim by purchase. Therefore, if two sisters purchased lands, to hold to them and their heirs, they are not parceners, but joint-tenants; and hence it likewise follows, that no lands can be held in co-parcenary, but estates of inheritance, which are of a descendible nature; whereas not only

⁴ Estates in coparcenary do not exist in the United States. In similar cases, the lands which descend are held by tenancy in common.

estates in fee and in tail, but for life or years, may be held in joint-tenancy. 2. There is no unity of *time* necessary to an estate in co-parcenary. For if a man had two daughters, to whom his estate descends in co-parcenary, and one dies before the other, the surviving daughter and the heir of the other, or when both are dead, their two heirs are still parceners: the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. 3. Parceners, though they have a *unity* have not an *entirety* of interest. They are properly entitled each to the whole of a distinct moiety: and of course there is no *jus accrescendi*, or survivorship between them: for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether *189] male or female, called parceners. But if *the possession be once severed by partition, they are no longer parceners, but tenants in severalty; or if one parcener aliens her share, though no partition be made, then are the lands no longer held in *coparcenary*, but in *common*.

Parceners are so called, saith Littleton, because they may be constrained to make *partition*. And he mentions many methods of making it; four of which are by consent, and one by compulsion. The first is, where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part. The second is, when they agree to choose some friend to make partition for them, and then the sisters shall choose each of them her part according to seniority of age; or otherwise, as shall be agreed. The privilege of seniority is in this case personal; for if the eldest sister be dead, her issue shall not choose first, but the next sister. * * * * A third method of partition is, where the eldest divides, and then she shall choose last; for the rule of law is, *cujus est divisio, alterius est electio*. The fourth method is, where the sisters agree to cast lots for their shares. And these are the methods by consent. That by compulsion is, where one or more sue out a writ of partition against the others; whereupon the sheriff shall go to the lands, and make partition thereof by the verdict of a jury there impanelled, and assign to such of the parceners her part

in severalty. But there are some things *which are in [*190 their nature impartible. The mansion-house, common of estovers, common of piscary uncertain, or any other common without stint, shall not be divided; but the eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance: or, if that cannot be, then they shall have the profits of the thing by turns.

There is yet another consideration attending the estate in coparcenary, that if one of the daughters has had an estate given with her in *frank-marriage* by her ancestor (which we may remember was a species of estates-tail, freely given by a relation for the advancement of his kinswoman in marriage), in this case, if lands descend from the *same* ancestor to her and her sisters in fee-simple, she or her heirs shall have no share of them, unless they will agree to divide the lands so given in frank-marriage in equal proportion with the rest of the lands descending. This mode of division was known in the law of the Lombards; which directs the woman so preferred in marriage, and claiming her share of the inheritance, *mittere in confusum cum sororibus, quantum pater aut frater ei dederit, quando ambulaverit ad nuptum*. With us it is denominated bringing those lands into *hotch-pot*: which term I shall explain in the very words of Littleton: "It seemeth that this word *hotch-pot*, is in English a pudding; for in a pudding is not commonly put one thing alone, but one thing with other things together." By this housewifely metaphor our ancestors meant to inform us that the lands, both those given in frank-marriage and those descending in fee-simple, should be mixed and blended together, and then divided in equal portions among all the daughters. But this was left to the choice of the donee in frank-marriage: and if she did not choose to put her lands into hotch-pot, she was presumed to be sufficiently *provided for, [*191 and the rest of the inheritance was divided among her other sisters. The law of hotch-pot took place only when the other lands descending from the ancestor were fee-simple; for if they descended in tail, the donee in frank-marriage was entitled to her share, without bringing her lands so given into hotch-pot. And the reason is, because lands descending in fee-simple are distributed, by the policy of law, for the maintenance of all the daughters, and if one has a sufficient provision out of the same inheritance, equal to the rest, it is not reasonable that she should

have more : but lands, descending in tail, are not distributed by the operation of the law, but by the designation of the giver, *per formam doni* : it matters not therefore how unequal this distribution may be. Also, no lands, but such as are given in frank-marriage, shall be brought into hotch-pot ; for no others are looked upon in law as given for the advancement of the woman, or by way of marriage-portion. And, therefore, as gifts in frank-marriage are fallen into disuse, I should hardly have mentioned the law of hotch-pot, had not this method of division been revived and copied by the statute for distribution of personal estates, which we shall hereafter consider at large.

The estate in coparcenary may be *dissolved*, either by partition, which disunites the possession ; by alienation of one parcener, which disunites the title, and may disunite the interest ; or by the whole at last descending to and vesting in one single person, which brings it to an estate in severalty.

IV. Tenants in *common* are such as hold by several and distinct titles, but by unity of possession ; because none knoweth his own severalty, and therefore they all occupy promiscuously. This tenancy therefore happens where there is a unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For if there be two tenants in common of lands, one may hold his part in fee-simple, the other in *192] tail, or for life ; so that there is no *necessary unity of interest : one may hold by descent, the other by purchase ; or the one by purchase from A, the other by purchase from B ; so that there is no unity of title ; one's estate may have been vested fifty years, the other's but yesterday ; so there is no unity of time. The only unity there is, is that of possession : and for this Littleton gives the true reason, because no man can certainly tell which part is his own ; otherwise even this would be soon destroyed.

Tenancy in common may be created, either by the destruction of the two other estates, in joint-tenancy and coparcenary, or by special limitation in a deed.⁵ By the destruction of the two other estates, I mean such destruction as does not sever the

⁵ One of the most common modes in which tenancies in common are created in the United States, is by the descent of lands from an ancestor dying intestate, upon two or more persons as heirs at law. Various modes of limiting an estate which would have created a joint-tenancy at common law are now held to create a tenancy in common (see *ante*, note 1).

unity of possession, but only the unity of title or interest. As, if one of two joint-tenants in fee, alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common ; for they have now several titles, the other joint-tenant by the original grant, the alienee by the new alienation ; and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life only. So, if one joint-tenant gives his part to A in tail, and the other gives his to B in tail, the donees are tenants in common, as holding by different titles and conveyances. If one of two parceners alienes, the alienee and the remaining parcener are tenants in common ; because they hold by different titles, the parcener by descent, the alienee by purchase. So likewise, if there be a grant to two *men*, or two *women*, and the heirs of their bodies, here the grantees shall be joint-tenants of the life-estate, but they shall have several inheritances ; because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to *a man and woman*, and the heirs of their bodies begotten : and in this, and the like cases, their issue shall be tenants in common ; because they must claim by different titles, one as heir of A, and the other as heir of B ; and those two not titles by *purchase, but descent. In short, whenever an estate in [*193 joint-tenancy or coparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common.

A tenancy in common may also be created by express limitation in a deed ; but here care must be taken not to insert words which imply a joint-estate ; and then if land be given to two or more, and it be not joint-tenancy, it must be a tenancy in common. But the law is apt in its constructions to favor joint-tenancy, rather than tenancy in common, because the divisible services issuing from land (as rent, etc.), are not divided, nor the entire services (as fealty) multiplied, by joint-tenancy, as they must necessarily be upon a tenancy in common. Land given to two, to be holden the one moiety to one, and the other moiety to the other, is an estate in common ; and if one grants to another *half* his land, the grantor and grantee are also tenants in common ; because as has been before observed, joint-tenants do not take by distinct halves or moieties ; and by such grants the division and severalty of the estate is so plainly expressed, that

it is impossible they should take a joint-interest in the whole of the tenements. But a *devise* to two persons to hold *jointly and severally*, is said to be a joint-tenancy ; because that is necessarily implied in the word “jointly,” the word “severally” perhaps only implying the power of partition : and an estate given to A and B, *equally to be divided* between them, though in *deeds* it hath been said to be a joint-tenancy (for it implies no more than the law has annexed to that estate, *viz.*, divisibility), yet in *wills* it is certainly a tenancy in common ; because the devisor may be presumed to have meant what is most beneficial to both devisees, though his meaning is imperfectly expressed. And this nicety in the wording of grants makes it the most usual as well *194] as the safest way, when a tenancy in common *is meant to be created, to add express words of exclusion as well as description, and limit the estate to A and B, to hold *as tenants in common, and not as joint-tenants*.

As to the *incidents* attending a tenancy in common : tenants in common (like joint-tenants) are compellable by the statutes of Henry VIII. and William III., before mentioned, to make partition of their lands ; which they were not at common law. They properly take by distinct moieties, and have no entirety of interest ; and therefore there is no survivorship between tenants in common. Their other incidents are such as merely arise from the unity of possession ; and are therefore the same as appertain to joint-tenants merely upon that account : such as being liable to reciprocal actions of waste, and of account, by the statutes of Westm. 2. ch. 22. and 4 Ann. ch. 16. For by the common law no tenant in common was liable to account with his companion for embezzling the profits of the estate ; though, if one actually turns the other out of possession, an action of ejectment will lie against him. But, as for other incidents of joint-tenants, which arise from the privity of title, or the union and entirety of interest (such as joining or being joined in actions, unless in the case where some entire or indivisible thing is to be recovered), these are not applicable to tenants in common, whose interests are distinct, and whose titles are not joint but several.

Estates in common can only be dissolved two ways ; 1. By uniting all the titles and interests in one tenant, by purchase or otherwise ; which brings the whole to one severalty : 2. By making partition between the several tenants in common, which

gives them all respective severalties. For indeed tenancies in common differ in nothing from sole estates, but merely in the blending and unity of possession. And this finishes our inquiries with respect to the nature of *estates*.

CHAPTER XIII.

[BL. COMM.—BOOK II. CH. XIII.]

Of the Title to Things Real, in General.

THE foregoing chapters having been principally employed in defining the *nature* of things real, in describing the *tenures* by which they may be holden, and in distinguishing the several kinds of *estate* or interest that may be had therein; I now come to consider, lastly, the *title* to things real, with the manner of acquiring and losing it.

A title is thus defined by Sir Edward Coke—*Titulus est justa causa possidendi id quod nostrum est*: or, it is the means whereby the owner of lands hath the just possession of his property.

There are several stages or degrees requisite to form a complete title to lands and tenements. We will consider them in a progressive order.

I. The lowest and most imperfect degree of title consists in the mere *naked possession*, or actual occupation of the estate; without any apparent right, or any shadow or pretence of right, to hold and continue such possession. This may happen when one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands; which is termed a *disseizin*, being a deprivation of that actual seizin, or corporal freehold of the lands, which the tenant before enjoyed. Or it may happen, that after the death of the ancestor and before the entry of *the heir, or after the death of a particular [*196 tenant and before the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land, and hold out him that had a right to enter. In all which cases, and

many others that might be here suggested, the wrong-doer has only a mere naked possession, which the rightful owner may put an end to, by a variety of legal remedies, as will more fully appear in the third book of these Commentaries. But in the mean time, till some act be done by the *rightful* owner to divest this possession and assert his title, such actual possession is, *prima facie*, evidence of a legal title in the possessor ; and it may, by *length of time*, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title. And, at all events, without such actual possession no title can be completely good.

II. The next step to a good and perfect title is the *right of possession*, which may reside in one man, while the actual possession is not in himself, but in another. For if a man be disseized, or otherwise kept out of possession, by any of the means before mentioned, though the *actual* possession be lost, yet he has still remaining in him the *right* of possession ; and may exert it whenever he thinks proper, by entering upon the disseizor, and turning him out of that occupancy which he has so illegally gained. But this right of possession is of two sorts : an *apparent* right of possession, which may be defeated by proving a better ; and an *actual* right of possession, which will stand the test against all opponents. Thus if the disseizor, or other wrongdoer, dies possessed of the land whereof he so became seized by his own unlawful act, and the same descends to his heir ; now by the common law the heir hath obtained an *apparent* right, though the *actual* right of possession resides in the person disseized ; and it shall not be lawful for the person disseized to divest this apparent right by mere entry or other act of his own, but only an action at law : for, until the contrary be proved by legal demonstration, *197] the law will rather presume the right to *reside in the heir, whose ancestor died seized, than in one who has no such presumptive evidence to urge in his own behalf. Which doctrine in some measure arose from the principles of the feudal law, which, after feuds became hereditary, much favored the right of descent ; in order that there might be a person always upon the spot to perform the feudal duties and services ; and therefore when a feudatory died in battle, or otherwise, it presumed always that his children were entitled to the feud, till the right was otherwise determined by his fellow-soldiers and fellow-tenants, the peers of the feudal court. But if he, who has the actual right of possession

puts in his claim, and brings his action within a reasonable time, and can prove by what unlawful means the ancestor became seized, he will then by sentence of law recover that possession, to which he hath such actual right. Yet, if he omits to bring this his possessory action within a competent time, his adversary may imperceptibly gain an actual right of possession, in consequence of the other's negligence.* And by this, and certain other means, the party kept out of possession may have nothing left in him, but what we are next to speak of; *viz.:*

III. The mere *right of property*, the *jus proprietatis*, without either possession or even the right of possession. This is frequently spoken of in our books under the name of the *mere right*, *jus merum*; and the estate of the owner is in such cases said to be totally divested, and *put to a right*. A person in this situation may have the true ultimate property of the lands in himself: but by the intervention of certain circumstances, either by his own negligence, the solemn act of his ancestor, or the determination of a court of justice, the presumptive evidence of that right is strongly in favor of his antagonist; who has thereby obtained the absolute right of possession. As, in the first place, if a person disseized, or turned out of possession of his estate, neglects to pursue his remedy within the time limited by law: by this means the disseizor or his heirs gain the actual right of possession: *for the law presumes that either he [*198 had a good right originally, in virtue of which he entered on the lands in question, or that since such his entry he has procured a sufficient title; and, therefore, after so long an acquiescence, the law will not suffer his possession to be disturbed without inquiring into the absolute right of property. Yet, still, if the person disseized or his heir has the true right of property remaining in himself, his estate is indeed said to be turned into a mere right; but, by proving such his better right, he may at length recover the lands. Again, if a tenant in tail discontinues his estate-tail, by alienating the lands to a stranger in fee, and dies; here the issue in tail hath no right of *possession*, independent of the right of *property*: for the law presumes, *prima facie*, that the ancestor would not disinherit, or attempt to disinherit, his heirs, unless he had power so to do; and therefore, as the ancestor had in himself the right of possession, and has transferred the same to a stranger, the law will not permit that possession now to be disturbed,

unless by showing the absolute right of property to reside in another person. The heir therefore in this case has only a *mere right*, and must be strictly held to the proof of it, in order to recover the lands. Lastly, if by accident, neglect, or otherwise, judgment is given for either party in any *possessory* action (that is, such wherein the right of possession only, and not that of property, is contested), and the other party hath indeed in himself the right of property, this is now turned to a *mere right*; and upon proof thereof in a subsequent action denominated a writ of right, he shall recover his seizin of the lands.

Thus, if a disseizor turns me out of possession of my lands, he thereby gains a *mere naked possession*, and I still retain the *right of possession*, and *right of property*. If the disseizor dies, and the lands descend to his son, the son gains an *apparent* right of *possession*; but I still retain the *actual* right both of *possession* and *property*. If I acquiesce for thirty years, without bringing any action to recover possession of the lands, the son gains the *199] *actual right of possession*, and I retain *nothing but the *mere right of property*. And even this right of property will fail, or at least it will be without a remedy, unless I pursue it within the space of *sixty* years. So also if the father be tenant in tail, and alienes the estate-tail to a stranger in fee, the alienee thereby gains the *right of possession*, and the son hath only the *mere right* or *right of property*. And hence it will follow, that one man may have the *possession*, another the *right of possession*, and a third the *right of property*.¹ For if a tenant in tail infeoffs A in

¹ The formerly established English doctrine, that one man might have the *possession*, another the *right of possession*, and a third the *right of property*, is no longer maintained. The law now recognizes only the *possession* and *right of possession*, ignoring altogether any *right of property*, as distinct from these symbols of ownership. This change has been effected by the abolition of those real actions, by which the right of property was determined, as distinguished from the right of possession. "The statute 3 & 4 Will. IV., ch. 27, provides that, at the determination of the period which it limits, the *right and title* of the person, who might within that time have pursued his remedy for the recovery of the property, *shall be extinguished*; and its great feature and chief effect therefore is, to make *right* dependent on *possession*, by limiting the period within which that right can be asserted, to 20 years from the time at which the right of the claimant first accrued." (Kerr's Blackstone, p. 167.)

In the United States, statutes of limitation usually prescribe the same period (20 years), as the time within which actions for the recovery of real property must be brought, to prevent the extinguishment of an owner's title by adverse possession.

fee-simple, and dies, and B disseizes A ; now B will have the *possession*, A the *right of possession*, and the issue in tail the *right of property* : A may recover the possession against B ; and afterwards the issue in tail may evict A, and unite in himself the possession, the right of possession, and also the right of property. In which union consists—

IV. A complete title to lands, tenements, and hereditaments. For it is an ancient maxim of the law, that no title is completely good, unless the right of possession be joined with the right of property ; which right is then denominated a double right, *jus duplicatum*, or *droit droït*. And when to this double right the actual possession is also united, there is, according to the expression of Fleta, *juris et seisinæ conjunctio*; then, and then only, is the title completely legal.

CHAPTER XIV.

[BL. COMM.—BOOK II. CH. XIV.]

*Of Title by Descent.*¹

THE several *gradations* and *stages*, requisite to form a *complete title* to lands, tenements, and hereditaments, having been briefly stated in the preceding chapter, we are next to consider the several *manners*, in which this complete title (and therein principally the right of *property*) may be reciprocally lost and acquired: whereby the dominion of things real is either continued or transferred from one man to another. And here we must first of all observe, that (as gain and loss are terms of relation, and of a reciprocal nature) by whatever method one man gains an estate, by that same method or its correlative some other man has lost it. As where the heir acquires by descent, the ancestor has first lost or abandoned his estate by his death: where the lord gains land by escheat, the estate of the tenant is first of all lost by the natural or legal extinction of all his hereditary blood: where a

¹ In this chapter a few passages, of comparatively little importance, have been omitted. The places of omission are distinguished by asterisks.

man gains an interest by occupancy, the former owner has previously relinquished his right of possession : where one man claims by prescription or immemorial usage, another man has either parted with his right by an ancient and now forgotten grant, or has forfeited it by the supineness or neglect of himself and his ancestors for ages : and so, in case of forfeiture, the tenant by his own misbehavior or neglect has renounced his interest in the estate ; whereupon it devolves to that person who by law may take advantage of such default ; and, in alienation by *201] common assurances, *the two considerations of loss and acquisition are so interwoven, and so constantly contemplated together, that we never hear of a conveyance, without at once receiving the idea as well of the grantor as the grantee.

The methods therefore of acquiring on the one hand, and of losing on the other, a title to estates in things real, are reduced by our law to two ; *descent*, where the title is vested in a man by the single operation of law ; and *purchase*, where the title is vested in him by his own act or agreement.

Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir-at-law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor : and an estate, so descending to the heir, is in law called the inheritance.

The doctrine of descents, or law of inheritances in fee-simple, is a point of the highest importance ; and is indeed the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descents is broken and altered, perpetually refer to this settled law of inheritance, as a *datum* or first principle universally known, and upon which their subsequent limitations are to work. Thus a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly understood without a previous knowledge of the law of descents in fee-simple. One may well perceive that this is an estate confined in its descent to such heirs only of the donee, as have sprung or shall spring from his body ; but who those heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldest, youngest, or other son alone, or all the sons together, shall be his heirs ; this is a point that we must result

back to the standing law of descents in fee-simple to be informed of.

*In order, therefore, to treat a matter of this universal [*202 consequence the more clearly, I shall endeavor to lay aside such matters as will only tend to breed embarrassment and confusion in our inquiries, and shall confine myself entirely to this one object. I shall therefore decline considering at present who are, and who are not, capable of being heirs ; reserving that for the chapter of *escheats*. I shall also pass over the frequent division of descents into those by *custom*, *statute*, and *common law* : for descents by *particular custom*, as to all the sons in gavelkind, and to the youngest in borough-english, have already been often hinted at, and may also be incidentally touched upon again ; but will not make a separate consideration by themselves, in a system so general as the present : and descents by *statute*, or feetail *per formam doni*, in pursuance of the statute of Westminster the second, have also been already copiously handled ; and it has been seen that the descent in tail is restrained and regulated according to the words of the original donation, and does not entirely pursue *the common law doctrine of inheritance* ; which, and which only, it will now be our business to explain.

And, as this depends not a little on the nature of kindred, and the several degrees of consanguinity, it will be previously necessary to state, as briefly as possible, the true notion of this kindred or alliance in blood.

Consanguinity, or kindred, is defined by the writers on these subjects to be “ *vinculum personarum ab eodem stipite descenditum* :” the connection or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal, or collateral.

*Lineal consanguinity is that which subsists between [*203 persons, of whom one is descended in a direct line from the other, as between John Stiles (the *propositus* in the table of consanguinity) and his father, grandfather, great-grandfather, and so upwards in the direct ascending line ; or between John Stiles and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards : the father of John Stiles is related to him in the first degree, and so likewise is his son ; his grandsire

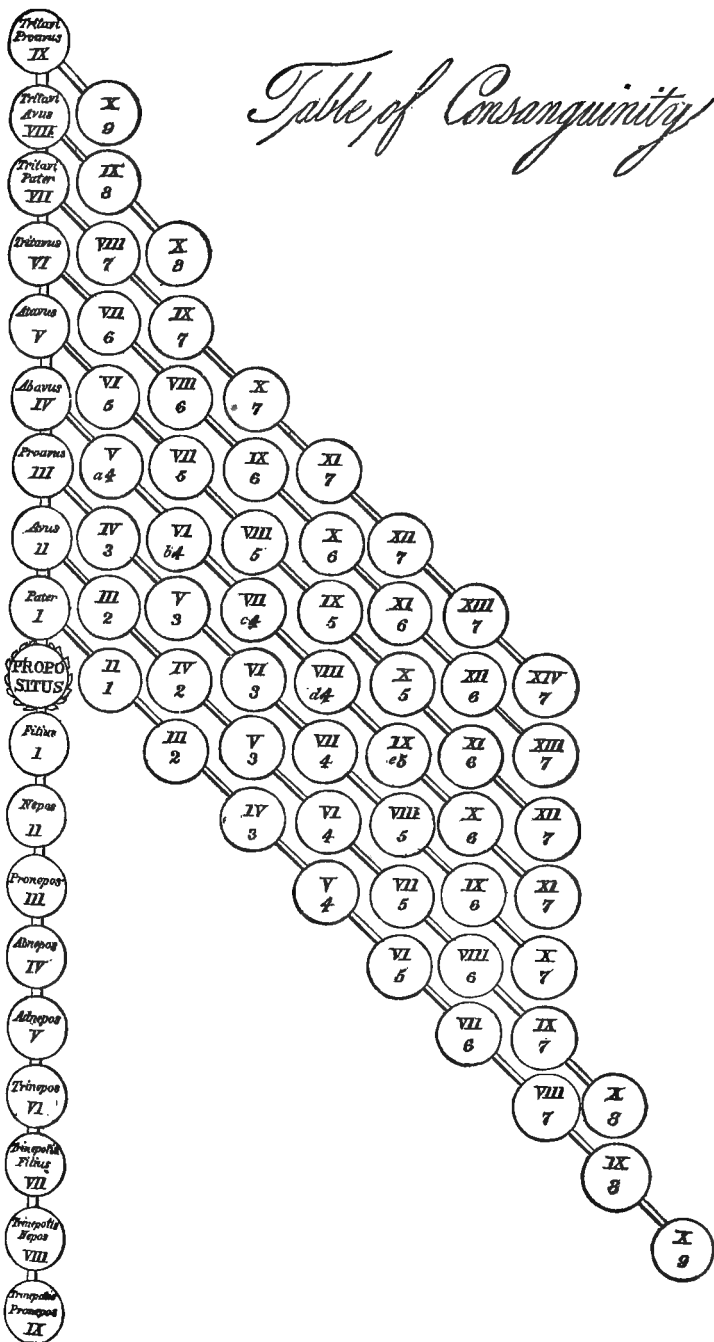
and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil, and canon, as in the common law.

The doctrine of lineal consanguinity is sufficiently plain and obvious; but it is at the first view astonishing to consider the number of lineal ancestors which every man has, within no very great number of degrees; and so many different bloods is a man said to contain in his veins, as he hath lineal ancestors. Of these he hath two in the first ascending degree, his own parents; he hath four in the second, the parents of his father and the parents of his mother; he hath eight in the third, the parents of his two grandfathers and two grandmothers; and by the same rule of progression, he hath an hundred and twenty-eight in the seventh; a thousand and twenty-four in the tenth: and at the twentieth degree, or the distance of twenty generations, every man hath above a million of ancestors, as common arithmetic will demonstrate.² This lineal consanguinity, we observe, falls strictly *204] within the definition of *vinculum personarum ab eodem stipite descendentium*; since lineal relations are such as descend one from the other, and both of course from the same common ancestor.

Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestors, but differing in this, that they do not descend one from the other. Collateral kinsmen are such then as lineally spring from one and the same ancestor, who is the *stirps*, or root, the *stipes*, trunk, or common stock, from whence these relations are branched out. As if John Stiles hath two *205] sons, who hath each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have

² [This calculation is right in numbers, but is founded on a false supposition as is evident from the results; one of which is to give a man a greater number of ancestors all living at one time than the whole population of the earth: another would be, that each man now living, instead of being descended from Noah and his wife alone, might claim to have had at that time an almost indefinite number of relatives. Intermarriages among relatives are one check on this incredible increase of relatives. This is noticed afterwards by Blackstone, as to collateral relatives.]

Table of Consanguinity



a portion of his blood in their veins, which denominates them *consanguineos*.

We must be careful to remember, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus *Titius* and his brother are related; why? because both are derived from one father. *Titius* and his first cousin are related; why? because both descend from the same grandfather; and his second cousin's claim to consanguinity is this, that they are both derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived. And as we are taught by holy writ, that there is one couple of ancestors belonging to us all, from whom the whole race of mankind is descended, the obvious and undeniable consequence is, that all men are in some degree related to each other. For indeed, if we only suppose each couple of our ancestors to have left, one with another, two children; and each of those children on an average to have left two more (and, without such a supposition, the human species must be daily diminishing); we shall find that all of us have now subsisting near two hundred and seventy millions of kindred in the fifteenth degree, at the same distance from the several common ancestors as ourselves are; besides those that are one or two descents nearer to or farther from the common stock, who may amount to as many more. And if this calculation should appear incompatible with the number of inhabitants on the earth, it is because, by intermarriages among the several descendants from the same ancestor, a hundred or a thousand modes of consanguinity may be consolidated in one person, or he may be related to us a hundred or a thousand different ways.

*The method of computing these degrees in the [*206 canon law, which our law has adopted, is as follows: we begin at the common ancestor, and reckon downwards: and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus *Titius* and his brother are related in the first *degree; for from the father to each of them [*207 is counted only one. *Titius* and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor; viz. his own grandfather, the father of *Titius*

Or (to give a more illustrious instance from our English annals), King Henry the Seventh, who slew Richard the Third in the battle of Bosworth, was related to that prince in the fifth degree. Let the *propositus* therefore in the table of consanguinity represent King Richard the Third, and the class marked (e) King Henry the Seventh. Now their common stock or ancestor was King Edward the Third, the *abavus* in the same table: from him to Edmond Duke of York, the *proavus*, is one degree; to Richard Earl of Cambridge, the *avus*, two; to Richard Duke of York, the *pater*, three; to King Richard the Third, the *propositus*, four; and from King Edward the Third to John of Gaunt (a) is one degree; to John Earl of Somerset (b), two; to John Duke of Somerset (c), three; to Margaret Countess of Richmond (d), four; to King Henry the Seventh (e), five. Which last-mentioned prince, being the farthest removed from the common stock, gives the denomination to the degree of kindred in the canon and municipal law. Though, according to the computation of the civilians (who count upwards, from either of the persons related, to the common stock, and then downwards again to the other: reckoning a degree for each person both ascending and descending), these two princes were related in the ninth degree, for from King Richard the Third to Richard Duke of York is one degree; to Richard Earl of Cambridge, two; to Edmond Duke of York, three; to King Edward the Third, the common ancestor, four; to John of Gaunt, five; to John Earl of Somerset, six; to John Duke of Somerset, seven; to Margaret Countess of Richmond, eight; to King Henry the Seventh, nine.

***208]** * The nature and degrees of kindred being thus in some measure explained, I shall next proceed to lay down a series of rules or canons of inheritance, according to which, estates are transmitted from the ancestor to the heir; together with an explanatory comment, remarking their original and progress, the reasons upon which they are founded, and in some cases their agreement with the laws of other nations.

1. The first rule is, that inheritances shall lineally descend to the issue of the person who last died actually seized *in infinitum*; but shall never lineally ascend.⁸

⁸ This rule was changed in England, by statute 3 & 4 Will. IV., ch. 106, which went into effect in 1834. The rule now established is, that inheritance shall be traced from the last purchaser of the property; and for this purpose

To explain the more clearly both this and the subsequent rules, it must first be observed, that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. *Nemo est hæres viventis*. Before that time the person who is next in the line of succession is called an *heir apparent*, or heir *presumptive*. Heirs *apparent* are such, whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must by the course of the common law be heir to the father whenever he happens to die. Heirs *presumptive* are such who, if the ancestor should die immediately, would in the present circumstances of things be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother, or nephew, or daughter, in the former cases, the estate shall be divested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally divested by the birth of a posthumous son.* We must also remember, [*209 that no person can be properly such an ancestor, as that an inheritance of lands or tenements can be derived from him, unless he hath had *actual seizin* of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, the person last entitled to the property shall be deemed to be the purchaser, unless it be proved that he inherited it. The ancient maxim, *seisina facit stipitem*, is therefore, entirely abrogated. The person "last entitled to the property" includes the last person who had a right thereto, whether he did or did not obtain the possession, or receive the rents and profits thereof.

The rule that inheritances never lineally ascend, has also been altered; and it is now provided that an inheritance shall descend to the issue of the last purchaser, and that, on failure of his issue, it shall pass to his nearest lineal ancestor, or the issue of such ancestor, the ancestor taking in preference to his or her issue. Paternal ancestors and their descendants are preferred to maternal ancestors and their descendants.

In this country, the doctrine, *seisina facit stipitem*, has also been abolished in most, if not all, of the States, and an estate of inheritance passes to the heirs of the person who last had the right of ownership therein; and it is also a general rule that, in default of lineal descendants, lineal ancestors inherit, in preference to relatives of the collateral line. But collateral relatives are usually admitted after a father or mother, in preference to more remote lineal ancestors

or by receiving rent from a lessee of a freehold : or unless he hath had what is equivalent to corporal seizin in hereditaments that are incorporeal ; such as the receipt of rent, a presentation to the church in case of an advowson, and the like. But he shall not be accounted an ancestor, who hath had only a bare right or title to enter or be otherwise seized. And therefore all the cases which will be mentioned in the present chapter, are upon the supposition that the *deceased* (whose inheritance is now claimed) *was* the *last person actually seized* thereof. For the law requires this notoriety of *possession*, as evidence that the ancestor had that property in himself, which is now to be transmitted to his heir. Which notoriety had succeeded in the place of the ancient feudal investiture, whereby, while feuds were precarious, the vassal on the descent of lands was formerly admitted in the lord's court (as is still the practice in Scotland) and there received his seizin, in the nature of a renewal of his ancestor's grant, in the presence of the feudal peers ; till at length, when the right of succession became indefeasible, an entry on any part of the lands within the county (which if disputed was afterwards to be tried by those peers), or other notorious possession, was admitted as equivalent to the formal grant of seizin, and made the tenant capable of transmitting his estate by descent. The seizin therefore of any person, thus understood, makes him the root or stock, from which all future inheritance by right of blood must be derived : which is very briefly expressed in this maxim, *seisina facit stipitem*.

*210] *When therefore a person dies so seized, the inheritance first goes to his issue : as if there be Geoffrey, John, and Matthew, grandfather, father, and son ; and John purchases lands, and dies ; his son Matthew shall succeed him as heir, and not the grandfather Geoffrey ; to whom the land shall *never ascend*, but shall rather escheat to the lord.

This rule, so far as it is affirmative and relates to *lineal* descents, is almost universally adopted by all nations ; and it seems founded on a principle of natural reason, that (whenever a right of property transmissible to representatives is admitted) the possessions of parents should go, upon their decease, in the first place to their children, as those to whom they have given being, and for whom they are therefore bound to provide. But the negative branch, or total exclusion of parents and all *lineal*

ancestors from succeeding to the inheritance of their offspring, is peculiar to our own laws, and such as have been deduced from the same original. * * * Yet that there is nothing unjust or absurd in it, but that on the contrary it is founded upon very good legal reason, may appear from considering as well the nature of the rule itself, as the occasion of introducing it into our laws.

* We are to reflect, in the first place, that all rules of [*211 succession to estates are creatures of the civil polity, and *juris positivi* merely. The right of property, which is gained by occupancy, extends naturally no farther than the life of the present possessor: after which the land by the law of nature, would again become common, and liable to be seized by the next occupant; but society, to prevent the mischiefs that might ensue from a doctrine so productive of contention, has established conveyances, wills, and successions; whereby the property originally gained by possession is continued and transmitted from one man to another, according to the rules which each state has respectively thought proper to prescribe. There is certainly therefore no injustice done to individuals, whatever be the path of descent marked out by the municipal law.

If we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to be made, but that it was introduced at the same time with, and in consequence of, the feudal tenures. For it was an express rule of the feudal law, that *successionis feudi talis est natura, quod ascendentes non succedunt*; and therefore the same maxim obtains also in the French law to this day. Our Henry the First indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line: but this soon fell again into disuse; for so early as Glanvil's time, who wrote under Henry the Second, we find it laid down as established law, that *hæreditas nunquam ascendit*; which has remained an invariable maxim ever since. These circumstances evidently show this rule to be of feudal origin.

* * * * *

II. A second general rule or canon is, that the male issue shall be admitted before the female.*

* This canon is still in force in English law, but does not prevail in the United States, where it is the established rule that all the children shall inherit equally, males and females being classed together.

***213]** *Thus sons shall be admitted before daughters; or, as our male lawgivers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred. As if John Stiles hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; first Matthew, and (in case of his death without issue) then Gilbert shall be admitted to the succession in preference to both the daughters.

This preference of males to females is entirely agreeable to the law of succession among the Jews, and also among the states of Greece, or at least among the Athenians; but was totally unknown to the laws of Rome (such of them, I mean, as are at present extant) wherein brethren and sisters were allowed to succeed to equal portions of the inheritance. I shall not here enter into the comparative merit of the Roman and the other constitutions in this particular, nor examine into the greater dignity of blood in the male or female sex: but shall only observe, that our present preference of males to females seems to have arisen entirely from the feudal law. For though our British ancestors, the Welsh, appear to have given a preference to males, yet our Danish predecessors (who succeeded them) seem to have made no distinction of sexes, but to have admitted all the children at once to the inheritance. But the feudal law of the Saxons on the continent (which was probably brought over hither, and first altered by the law of king Canute) gives an evident preference of the male to the female sex. "*Pater aut mater defuncti, filio non filiæ, hæreditatem relinquent. Qui defunctus non filios sed filias reliquerit, ad eas omnis hæreditas pertineat.*" It is possible therefore that this preference might be a branch of that imperfect system of feuds, which obtained here before the conquest; especially as it subsists among the ***214]** customs of gavelkind, and as, in the *charter or laws of King Henry the First, it is not (like many Norman innovations) given up, but rather enforced. The true reason of preferring the males must be deduced from feudal principles: for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud, inasmuch as they were incapable of performing those military services, for the sake of which that system was established. But our law does not extend to a total exclusion of females, as the Salic law, and others, where feuds were most strictly retained: it only postpones them to males;

for though daughters are excluded by sons, yet they succeed before any collateral relations ; our law thus steering a middle course, between the absolute rejection of females, and the putting them on a footing with males.

III. A third rule or canon of descent is this : that where there are two or more males, in equal degree, the eldest only shall inherit ; but the females all together.⁵

As if a man hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies ; Matthew his eldest son shall alone succeed to his estate, in exclusion of Gilbert the second son and both daughters ; but, if both the sons die without issue before the father, the daughters Margaret and Charlotte shall both inherit the estate as coparceners.

This right of primogeniture in males seems anciently to have only obtained among the Jews, in whose constitution the eldest son had a double portion of the inheritance ; in the same manner as with us, by the laws of King Henry the First, the eldest son had the capital fee or principal feud of his father's possessions, and no other pre-eminence ; and *as the eldest daughter [*215 had afterwards the principal mansion, when the estate descended in coparcenary. The Greeks, the Romans, the Britons, the Saxons, and even originally the feudists, divided the lands equally ; some among all the children at large, some among the males only. This is certainly the most obvious and natural way ; and has the appearance, at least in the opinion of younger brothers, of the greatest impartiality and justice. But when the emperors began to create honorary feuds, or titles of nobility, it was found necessary (in order to preserve their dignity) to make them impartible, or (as they styled them) *feuda individua*, and in consequence descendible to the eldest son alone. This example was farther enforced by the inconveniences that attended the splitting of estates ; namely, the division of military services, the multitude of infant tenants incapable of performing any duty, the consequential weakening of the strength of the kingdom, and the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to

⁵ This right of primogeniture is not recognized in the United States. No distinction is made between the children in regard to their interests in the estate of the deceased.

themselves and the public, by engaging in mercantile, in military, in civil, or in ecclesiastical employments. These reasons occasioned an almost total change in the method of feudal inheritances abroad; so that the eldest male began universally to succeed to the whole of the lands in all military tenures: and in this condition the feudal constitution was established in England by William the Conqueror.

Yet we find that socage estates frequently descended to all the sons equally, so lately as when Glanvil wrote, in the reign of Henry the Second; and it is mentioned in the Mirror as a part of our ancient constitution, that knights' fees should descend to the eldest son, and socage fees should be partible among the male children. However, in Henry the Third's time, we find by Bracton that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stands: *except in Kent, where they gloried in the preservation of their ancient gavelkind tenure, of which a principal branch was a joint inheritance of all the sons; and except in some particular manors and townships, where their local customs continued the descent, sometimes to all, sometimes to the youngest son only, or in other more singular methods of succession.

As to the females, they are still left as they were by the ancient law: for they were all equally incapable of performing any personal service; and therefore one main reason of preferring the eldest ceasing, such preference would have been injurious to the rest: and the other principal purpose, the prevention of the too minute subdivision of estates, was left to be considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took place as to the inheritance of the crown; wherein the necessity of a sole and determinate succession is as great in the one sex as the other. And the right of sole succession, though not of primogeniture, was also established with respect to female dignities and titles of honor. For if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters; the eldest shall not of course be countess, but the dignity is in suspense or abeyance till the king shall declare his pleasure; for he, being the fountain of honor, may confer it on which of them he pleases. In which dis

position is preserved a strong trace of the ancient law of feuds, before their descent by primogeniture even among the males was established ; namely, that the lord might bestow them on which of the sons he thought proper—“*progressum est ut ad filios deveniret, in quem scilicet dominus hoc vellet beneficium confirmare.*”

IV. A fourth rule, or canon of descents, is this : that the lineal descendants, *in infinitum*, of any person deceased *shall represent their ancestor ; that is, shall stand in the [*217 same place as the person himself would have done, had he been living.⁶

Thus the child, grandchild, or great-grandchild (either male or female) of the eldest son succeeds before the youngest son, and so *in infinitum*. And these representatives shall take neither more nor less, but just so much as their principals would have done. As if there be two sisters, Margaret and Charlotte ; and Margaret dies, leaving six daughters ; and then John Stiles, the father of the two sisters, dies without other issue : these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living ; that is, a moiety of the lands of John Stiles in coparcenary : so that, upon partition made, if the land be divided into twelve parts thereof, Charlotte the surviving sister shall have six, and her six nieces, the daughters of Margaret, one apiece.

This taking by representation is called succession *in stirpes*, according to the roots : since all the branches inherit the same share that their root, whom they represent, would have done. * * * *

This mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the first-born among the males, to both which the Roman law is a stranger. For if all the children of three sisters were in England to claim *per capita*, in their own right as next of kin to the ancestor, without any respect to the stocks from whence

⁶ This is also the general rule in the law of descent in the United States, when the lineal descendants are of *unequal* degrees of relationship to the common ancestor in whose estate they share ; but when they are of *equal* degrees of relationship, they take *per capita*, *i. e.* equally, or share and share alike.

they sprung, and those children were partly male and partly female; then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters; or else the law in this instance must be inconsistent with itself, and depart from the preference which is constantly given to the males and the first-born, among persons in equal degree. Whereas, by dividing the inheritance according to the roots, or *stirpes*, the rule of descent is kept uniform and steady: the issue of the eldest son excludes all other pretenders, as the son himself (if living) would have done; but the issue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the same: and among these several issues, or representatives of the respective roots, the same preference to males and the same right of primogeniture obtain as would have obtained at the first among the roots themselves, the sons or daughters of the deceased. And if a man hath two *219] sons, A and B, and A dies leaving two *sons, and then the grandfather dies; now the eldest son of A shall succeed to the whole of his grandfather's estate: and if A had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of B and his issue. But if a man hath only three daughters, C, D, and E; and C dies leaving two sons, D leaving two daughters, and E leaving a daughter and a son who is younger than his sister: here, when the grandfather dies, the eldest son of C shall succeed to one third, in exclusion of the younger; the two daughters of D to another third in partnership; and the son of E to the remaining third, in exclusion of his elder sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downwards *in infinitum*.

* * * * *

V. A fifth rule is that on failure of lineal descendants, or issue, of the person last seized, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.⁷

⁷ This rule is now modified by the provision, stated in a previous note, that lineal ancestors shall inherit in preference to collateral kindred.

The rule generally established in the American law of descent, which is most closely correspondent to this English rule, is that, in default of lineal descendants or ancestors who are first entitled to inherit the property, the

Thus if Geoffrey Stiles purchases land, and it descends to John Stiles, his son, and John dies seized thereof without issue; whoever succeeds to this inheritance must be of the blood of Geoffrey, the first purchaser of this family. The first purchaser, *perquisitor*, is he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent.

This is a rule almost peculiar to our own laws, and those of a similar original. For it was entirely unknown among the Jews, Greeks, and Romans; none of whose laws looked any farther than the person himself who died seized of the estate; but assigned him an heir, without considering by what title he gained it, or from what ancestor he derived it. But the law of Normandy agrees with our law in this respect; nor indeed is that agreement to be wondered at, since the law of descents in both is of feudal original; and this rule or canon cannot otherwise be accounted for than by recurring to feudal principles.

When feuds first began to be hereditary, it was made a necessary qualification of the heir, who would succeed to a feud that he should be of the blood of, that is, lineally de-* [*221 scended from, the first feudatory or purchaser. In consequence whereof, if a vassal died seized of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring; no, not even to his brother, because he was not descended, nor derived his blood, from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance. * * * The true feudal reason for which rule was this; that what was given to a man, for his personal service and personal merit, ought not to descend to any but the heirs of his person. * * *

However, in process of time, when the feudal rigor was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*; that is with all the qualifications the inheritance passes to collateral relatives. The classes of relatives who shall inherit in such a case are specially designated by the statutes of the several States, and there is considerable diversity of detail in the provisions of such statutes.

ties annexed to a feud derived from his ancestors, and then the collateral relations were admitted to succeed even *in infinitum*, because they might have been of the blood of, that is, descended *222] from the first imaginary purchaser. For *since it is not ascertained in such general grants, whether this feud shall be held *ut feudum paternum* or *feudum avitum*, but *ut feudum antiquum* merely ; as a feud of indefinite antiquity ; that is, since it is not ascertained from which of the ancestors of the grantee this feud shall be supposed to have descended ; the law will not ascertain it, but will suppose *any* of his ancestors, *pro re nata*, to have been the first purchaser ; and therefore it admits *any* of his collateral kindred (who have the other necessary requisites), to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors.

Of this nature are all the grants of fee-simple estates of this kingdom : for there is now in the law of England no such thing as a grant of a *feudum novum*, to be held *ut novum* ; unless in the case of a fee-tail, and there we see that this rule is strictly observed, and none but the lineal descendants of the first donee (or purchaser) are admitted ; but *every grant of lands in fee-simple is with us a feudum novum to be held ut antiquum, as a feud whose antiquity is indefinite* ; and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might have possibly been purchased, are capable of being called to the inheritance. * * * * *

This then is the great and general principle, upon which the law of collateral inheritances depends ; that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser ; or, that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law to have originally descended ; according to the rule laid down in the year-books, Fitzherbert, Brook, and Hale, “that he who would have been heir to the father of the deceased” (and, of course, to the mother, or any other real or supposed purchasing ancestor), “shall also be heir to the son ;” a maxim that will hold universally, except in the case of a brother or sister of the half-blood, which exception (as we shall see hereafter), depends upon very special grounds.

The rules of inheritance that remain are only rules of evidence, calculated to investigate who the purchasing ancestor

was; which **in feudis vere antiquis* has in process of [*224 time been forgotten, and is supposed so to be in feuds that are held *ut antiquis*.

VI. A sixth rule or canon therefore is, that the collateral heir of the person last seized must be his next collateral kinsman, of the *whole blood*.⁶

First, he must be his next collateral kinsman, either personally or *jure representationis*; which proximity is reckoned according to the canonical degrees of consanguinity before mentioned. Therefore, the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second. And herein consists the true reason of the different methods of computing the degrees of consanguinity, in the civil law on the one hand, and in the canon and common laws on the other. The civil law regards consanguinity, principally with respect to successions, and therein very naturally considers only the person deceased, to whom the relation is claimed; it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived from him; and makes not only his great-nephew, but also his first-cousin to be both related to him in the fourth degree; because there are three persons between him and each of them. The canon law regards consanguinity principally with a view to prevent incestuous marriages, between those who have a large proportion of the same blood running in their respective veins; and therefore looks up to the author of that blood, or the common ancestor, reckoning the degrees from him; so that the great nephew is related in the third canonical degree to the person proposed, and the first-cousin in the second; the former being distant three degrees from the common ancestor (the father of the *propositus*), and

⁶ This rule has also been altered to some extent by statute 3 & 4 Will. IV. ch. 106. Relatives of the half-blood are now entitled to inherit next after any relation in the same degree of the whole blood, and his issue, when the common ancestor is a male, and next after the common ancestor, when the common ancestor is a female.

In this country, there is much diversity in the statutory provisions of different States, in regard to inheritances by relatives of the whole and of the half-blood. In some States, no distinction is made between those two classes; but in the larger number, relatives of the half-blood are postponed to those of the whole blood. In no state, however, are those of the half blood entirely excluded from the inheritance.

therefore deriving only one-fourth of his blood from the same fountain ; the latter, and also the *propositus* himself, being each of them distant only two degrees from the common ancestor (the grandfather of each), and therefore having one-half of each of their bloods the same. The common law regards consanguinity principally with respect to descents; and having therein the same *225] object in view as the civil, it may seem as if it ought * to proceed according to the civil computation. But as it also respects the purchasing ancestor, from whom the estate was derived, it therein resembles the canon law, and therefore counts in degrees in the same manner. Indeed the designation of person, in seeking for the next of kin, will come to exactly the same end (though the degrees will be differently numbered), whichever method of computation we suppose the law of England to use ; since the right of representation, of the parent by the issue, is allowed to prevail *in infinitum*. This allowance was absolutely necessary, else there would have frequently been many claimants in exactly the same degree of kindred, as (for instance) uncles and nephews of the deceased ; which multiplicity, though no material inconvenience in the Roman law of partible inheritances, yet would have been productive of endless confusion where the right of sole succession, as with us, is established. The issue or descendants therefore of John Stiles's brother are all of them in the first degree of kindred with respect to inheritances, those of his uncle in the second, and those of his great-uncle in the third ; as their respective ancestors, if living, would have been ; and are severally called to the succession in right of such their representative proximity.

The right of representation being thus established, the former part of the present rule amounts to this ; that on failure of issue of the person last seized, the inheritance shall descend to the other subsisting issue of his next immediate ancestor. Thus, if John Stiles dies without issue, his estate shall descend to Francis, his brother, or his representatives ; he being lineally descended from Geoffrey Stiles, John's next immediate ancestor, or father. On failure of brethren, or sisters, and their issue, it shall descend to the uncle of John Stiles, the lineal descendant of his grandfather George, and so on *in infinitum*.* * * *

*226] * Now here it must be observed, that the lineal ances-

tors, though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring. And therefore in the Jewish law, which in this respect entirely corresponds with ours, the father or other lineal ancestor is himself said to be the heir, though long since dead, as being represented by the persons of his issue ; who are held to succeed, not in their own rights, as brethren, uncles, &c., but in right of representation, as the offspring of the father, grandfather, &c., of the deceased. But though the common ancestor be thus the root of the inheritance, yet with us it is not necessary to *name* him in making out the pedigree or descent. For the descent between two brothers is held to be an *immediate* descent ; and therefore title may be made by one brother or his representative *to* or *through* another without mentioning their common father.⁹ If Geoffrey Stiles hath two sons, John and Francis, Francis may claim as heir to John, without naming their father Geoffrey ; and so the son of Francis may claim as cousin and heir to Matthew the son of John, without naming the grandfather ; *viz.* as son of Francis, who was the brother of John, who was the father of Matthew. But though the common ancestors are not named in deducing the pedigree, yet the law still respects them as the fountains of inheritable blood : and therefore, in order to ascertain the collateral heir of John Stiles, it is first necessary to recur to his ancestors in the 'first degree ; and if they have left any other issue besides John, that issue will be his heir. On default of such, we must ascend one step higher, to the ancestors in the second degree, and then to those

⁹ This rule of law no longer prevails, since it was enacted by stat. 3 & 4 Will. IV. ch. 106, that no brother or sister should be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent. It was an important consequence of the former rule, that brothers who were natural-born subjects might inherit from each other, though the father was an alien stranger, through whom by law no inheritance could be traced. Since the descent between the brothers was deemed to be immediate, it was not traced through the father, and his alienage, therefore, was unimportant in this respect. (See *Collingwood v. Pace*. 1 Vent. 413.) But in recent times it has been provided by statute that relatives may inherit in certain cases, although it is necessary to trace descent through an alien ancestor. Similar statutes have been passed in a number of the United States. (See *Luhrs v. Eimer*, 80 N. Y. 171.)

in the third and fourth, and so upwards *in infinitum*, till some couple of ancestors be found, who have other issue descending from them besides the deceased, in a parallel or collateral line. From these ancestors the heir of John Stiles must derive his descent; and in such derivation the same rules must be observed [*227] served, with regard to the sex, *primogeniture and representation laid down with regard to lineal descents from the person of the last proprietor.

But, secondly, the heir need not be the nearest kinsman absolutely, but only *sub modo*; that is, he must be the nearest kinsman of the *whole* blood, for if there be a much nearer kinsman of the *half* blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded; nay, the estate shall escheat to the lord, sooner than the half blood shall inherit.

A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For, as every man's own blood is compounded of the bloods of his respective ancestors, he only is properly of the whole or entire blood with another, who hath (so far as the distance of degrees will permit) all the same ingredients in the composition of his blood that the other had. Thus, the blood of John Stiles being composed of those of Geoffrey Stiles his father, and Lucy Baker his mother, therefore his brother Francis, being descended from both the same parents, hath entirely the same blood with John Stiles; or he is his brother of the whole blood. But if, after the death of Geoffrey, Lucy Baker the mother marries a second husband, Lewis Gay, and hath issue by him; the blood of this issue, being compounded of the blood of Lucy Baker (it is true) on the one part, but that of Lewis Gay (instead of Geoffrey Stiles), on the other part, it hath therefore only half the same ingredients with that of John Stiles; so that he is only his brother of the half blood, and for that reason they shall never inherit to each other. So also, if the father has two sons, A and B, by different venters or wives; now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord. Nay, even if the father dies, and his lands descend to his eldest son A, who enters thereon, and dies seized without issue; still B shall not be heir to this estate, because he is only of the half blood to

A, the person last seized : but it shall descend to a sister (if any) of the whole blood to A : for in such cases the maxim is, that the seizin or *possessio fratris facit sororem esse hæredem*. Yet, had A died without entry, then B might have inherited; not as *heir to A his half-brother, but as heir to their common [*228 father, who was the person last actually seized.

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VII. The seventh and last rule or canon is, that in collateral inheritances the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near),—unless where the lands have, in fact, descended from a female.¹⁰

Thus the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all; and the relations of the father's father, before those of the father's mother; and so on. And in this the English law is not singular, but warranted by the examples of the Hebrew and Athenian laws, as stated by Selden and Petit: though among the Greeks in the time of Hesiod, when a man died without wife or children, all his kindred (without any *distinction) divided his es- [*235 tate among them. It is likewise warranted by the example of the Roman laws; wherein the *agnati*, or relations by the father, were preferred to the *cognati*, or relations by the mother, till the edict of the Emperor Justinian abolished all distinction between them. It is also conformable to the customary law of Normandy, which indeed in most respects agrees with our English law of inheritance.

However, I am inclined to think, that this rule of our law does not owe its immediate original to any view of conformity to those which I have just now mentioned; but was established in order to effectuate and carry into execution the fifth rule, or principal canon of collateral inheritance, before laid down; that every heir must be of the blood of the first purchaser. For, when such first purchaser was not easily to be discovered after a long course of descents, the lawyers not only endeavored to investigate him by taking the next relation of the whole blood to the person last in possession, but also, considering that a preference

¹⁰ This general rule still prevails in England, though somewhat modified in detail, but not in this country. In some States, however, lands descended from a maternal ancestor go to kindred in the maternal line, and paternal inheritances to paternal kindred.

had been given to males (by virtue of the second canon) through the whole course of lineal descent from the first purchaser to the present time, they judged it more likely that the lands should have descended to the last tenant from his male than from his female ancestors; from the father (for instance) rather than from the mother; from the father's father rather than from the father's mother: and therefore they hunted back the inheritance (if I may be allowed the expression) through the male line; and gave it to the next relations on the side of the father, the father's father, and so upwards, imagining with reason that this was the most probable way of continuing it in the line of the first purchaser. A conduct much more rational than the preference of the *agnati*, by the Roman laws: which, as they gave no advantage to the males in the first instance or direct lineal succession, had no reason for preferring them in the transverse collateral one: upon which account this preference was very wisely abolished by Justinian.

*236] * That this was the true foundation of the preference of the *agnati* or male stocks, in our law, will farther appear, if we consider, that, whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed; and no relation of his by the father's side, as such, can ever be admitted to them; because he cannot possibly be of the blood of the first purchaser. And so, *e converso*, if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. So also, if they in fact descended to John Stiles from his father's mother, Cecilia Kempe; here not only the blood of Lucy Baker, his mother, but also of George Stiles, his father's father, is perpetually excluded. And, in like manner, if they be known to have descended from Frances Holland, the mother of Cecilia Kempe, the line not only of Lucy Baker, and of George Stiles, but also of Luke Kempe, the father of Cecilia, is excluded. Whereas, when the side from which they descended is forgotten, or never known (as in the case of an estate newly purchased to be holden *ut feudum antiquum*), here the right of inheritance first runs up all the father's side, with a preference to the male stocks in every instance; and, if it finds no heirs there, it then, and then only, resorts to the mother's side; leaving no place untried, in order to find heirs that may by possibility be derived from the original purchaser. The greatest probability of

finding such was among those descended from the male ancestors ; but, upon failure of issue there, they may possibly be found among those derived from the females.

This I take to be the true reason of the constant preference of the agnatic succession, or issue derived from the male ancestors, through all the stages of collateral inheritance ; as the ability for personal service was the reason for preferring the males at first in the direct lineal succession. We see clearly, that if males had been perpetually admitted, in utter exclusion of females, the tracing the inheritance back through the male line of ancestors must at last have inevitably brought us up to the first purchaser : but as males have not been **perpetually* [*237 *admitted*, but only *generally preferred* ; as females have not been *utterly excluded*, but only *generally postponed* to males ; the tracing the inheritance up through the male stocks will not give us absolute demonstration, but only a strong probability, of arriving at the first purchaser ; which, joined with the other probability, of the wholeness or entirety of blood, will fall little short of a certainty.¹¹

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CHAPTER XV.

[BL. COMM.—BOOK II. CH. XV.]

Of Title by Purchase,

and

I. By Escheat.

PURCHASE, *perquisitio*, taken in its largest and most extensive sense, is thus defined by Littleton ; the possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. In this

¹¹ The law of descent in the United States is wholly statutory. The leading general principles, which are substantially the same in the various States, have been stated in the previous notes ; but for special details the statutes must be particularly consulted. (See Washburn on Real Prop. III. 1-50, 5th ed.)

sense it is contradistinguished from acquisition by right of blood, and includes every other method of coming to an estate, but merely that by inheritance: wherein the title is vested in a person, not by his own act or agreement, but by the single operation of law.

Purchase, indeed, in its vulgar and confined acceptation, is applied only to such acquisitions of land, as are obtained by way of bargain and sale for money, or some other valuable consideration. But this falls far short of the legal idea of purchase: for, if I *give* land freely to another, he is in the eye of the law a purchaser, and falls within Littleton's definition, for he comes to the estate by his own agreement; that is, he consents to the gift. A man who has his father's estate settled upon him in tail, before he was born, is also a purchaser; for he takes quite another estate than the law of descents would have given him. Nay, even if the ancestor devises his estate to his heir at law by will, *with* other limitations, *or* in any other shape than the course of descents would direct, such heir shall take by purchase. But if a man, seized in fee, devises his whole estate to his heir-at-law, so that the heir takes neither a greater nor a less estate by the *242] *devise than he would have done without it, he shall be adjudged to take by descent, even though it be charged with incumbrances; this being for the benefit of creditors, and others, who have demands on the estate of the ancestor. If a remainder be limited to the heirs of Sempronius, here Sempronius himself takes nothing; but if he dies during the continuance of the particular estate, his heirs shall take as purchasers. But if an estate be made to A for life, remainder to his right heirs in fee, his heirs shall take by descent¹: for it is an ancient rule of law, that whenever the ancestor takes an estate for life, the heir cannot by the same conveyance take an estate in fee by *purchase*, but only by *descent*. And if A dies, before entry, still his heirs shall take by descent, and not by purchase: for where the heir takes anything that might have vested in the ancestor, he takes by way of descent. The ancestor, during his life, beareth in himself all his heirs; and therefore, when once he is or might have been seized of the lands, the inheritance so limited to his

¹ This is the doctrine known in law as "the rule in Shelley's Case." It has been abolished by statute in some of the United States. (See 23 Wall. 486.)

heirs vests in the ancestor himself: and the word "heirs" in this case is not esteemed a word of *purchase*, but a word of *limitation*, enuring so as to increase the estate of the ancestor from a tenancy for life to a fee-simple. And, had it been otherwise, had the heir (who is uncertain till the death of the ancestor) been allowed to take as a purchaser originally nominated in the deed, as must have been the case if the remainder had been expressly limited to Matthew or Thomas by name; then, in the times of strict feudal tenure the lord would have been defrauded by such a limitation of the fruits of his seigniorship arising from a descent to the heir.

What we call *purchase*, *perquisitio*, the feudists called *conquest*, *conquæstus*, or *conquisitio*; both denoting any means of acquiring an estate out of the common course of inheritance. And this is still the proper phrase in the law of Scotland: as it was among the Norman jurists, who styled *the first [*243 purchaser (that is, he who brought the estate into the family who at present owns it) the conqueror or *conquereur*. Which seems to be all that was meant by the appellation which was given to William the Norman, when his manner of ascending the throne of England was, in his own and his successors' charters, and by the historians of the times, entitled *conquæstus*, and himself *conquestor* or *conquisitor*; signifying that he was the first of his family who acquired the crown of England, and from whom therefore all future claims by descent must be derived: though now, from our disuse of the feudal sense of the word, together with the reflection on his forcible method of acquisition, we are apt to annex the idea of *victory* to this name of *conquest* or *conquisition*: a title which, however just with regard to the *crown*, the conqueror never pretended with regard to the *realm* of England; nor, in fact, ever had.

The difference, in effect, between the acquisition of an estate by descent and by purchase, consists principally in these two points: I. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor. For, when a man takes an estate by purchase, he takes it not *ut feudum paternum* or *maternum*, which would descend only to the heirs by the father's or the mother's side: but he takes it *ut feudum antiquum*, as a feud of indefinite antiquity, whereby it becomes

inheritable to his heirs general, first of the paternal, and then of the maternal line. 2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will. For if the ancestor, by any deed, obligation, covenant, or the like, bindeth himself and his heirs, and dieth ; this deed, obligation, or covenant, shall be binding upon the heir, so far forth only as he (or any other in trust for him) had any estate of inheritance vested in him by descent *244] *from, (or any estate *per auter vie* coming to him by special occupancy, as heir to,) that ancestor, sufficient to answer the charge ; whether he remains in possession, or hath alienated it before action brought : which sufficient estate is in the law called *assets* : from the French word *assez*, enough. Therefore if a man covenants, for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or *assets*, by descent from the covenantor : for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsory, until he has assets by descent.

This is the legal signification of the word *perquisitio*, or purchase ; and in this sense it includes the five following methods of acquiring a title to estates : 1. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation. Of all these in their order.

I. Escheat, we may remember, was one of the fruits and consequences of feudal tenure. The word itself is originally French or Norman, in which language it signifies chance or accident ; and with us it denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency : in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee.

Escheat therefore being a title frequently vested in the lord by inheritance, as being the fruit of a signiory to which he was entitled by descent (for which reason the lands escheated shall attend the signiory, and be inheritable by such only of his heirs as are capable of inheriting the other), it may seem in such cases to fall more properly under the former general head of acquiring title to estates, *viz.* : by descent (being vested in him by act of *245] law, and not by his own act *or agreement,) than under

the present, by purchase. But it must be remembered that, in order to complete this title by escheat, it is necessary that the lord perform an act of his own, by *entering* on the lands and tenements so escheated, or suing out a *writ of escheat*;² on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a stranger who usurps the possession, his title by escheat is barred. It is therefore in some respect a title acquired by his own act, as well as by act of law. Indeed this may also be said of descents themselves, in which an entry or other seizin is required, in order to make a complete title; and therefore this distribution of titles by our legal writers, into those by descent and by purchase, seems in this respect rather inaccurate, and not marked with sufficient precision: for, as escheats must follow the nature of the signiory to which they belong, they may vest by either purchase or descent, according as the signiory is vested. And, though Sir Edward Coke considers the lord by escheat as in some respects the assignee of the last tenant, and therefore taking by purchase; yet, on the other hand, the lord is more frequently considered as being *ultimus hæres*, and therefore taking by descent in a kind of caducary succession.

The law of escheats is founded upon this single principle, that the blood of the person last seized in fee-simple is, by some means or other, utterly extinct and gone; and, since none can inherit his estate but such as are of his blood and consanguinity, it follows, as a regular consequence, that when such blood is extinct, the inheritance itself must fail: the land must become what the feudal writers denominate *feudum apertum*; and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given.

Escheats are frequently divided into those *propter defectum sanguinis*, and those *propter delictum tenentis*: the one sort, if the tenant dies without heirs; the other, if his blood be attainted. But both these species may well be *comprehended under [*246 the first denomination only; for he that is attainted suffers an extinction of his blood, as well as he that dies without relations. The inheritable quality is expunged in one instance, and expires

² The writ of escheat is now abolished. The remedy is by entry or action of ejectment, or, in case of the crown, by commission of escheat and "office found."

in the other ; or, as the doctrine of escheats is very fully expressed in Fleta, "*dominus capitalis feodi loco hæredis habetur, quoties per defectum vel delictum extinguitur sanguis tenentis.*"

Escheats therefore arising merely upon the deficiency of the blood, whereby the descent is impeded, their doctrine will be better illustrated by considering the several cases wherein hereditary blood may be deficient, than by any other method whatsoever.

1, 2, 3. The first three cases, wherein inheritable blood is wanting, may be collected from the rules of descent laid down and explained in the preceding chapter, and therefore will need very little illustration or comment. First, when the tenant dies without any relations on the part of any of his ancestors : secondly, when he dies without any relations on the part of those ancestors from whom his estate descended : thirdly, when he dies without any relations of the whole blood. In two of these cases the blood of the first purchaser is certainly, in the other it is probably, at an end ; and therefore in all of them the law directs, that the land shall escheat to the lord of the fee ; for the lord would be manifestly prejudiced, if, contrary to the inherent condition tacitly annexed to all feuds, any person should be suffered to succeed to the lands, who is not of the blood of the first feudatory, to whom for his personal merit the estate is supposed to have been granted.*

4. A monster, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage : but, although it hath deformity *247] in any part of its body, yet if it *hath human shape it may be heir. This is a very ancient rule in the law of England ; and its reason is too obvious, and too shocking to bear a minute discussion. The Roman law agrees with our own in excluding such births from successions : yet accounts them, however, children in some respects, where the parents, or at least the father, could reap any advantage thereby : (as the *jus trium liberorum*, and the like) esteeming them the misfortune, rather than the fault, of that parent. But our law will not admit a birth of this

* The modifications of the former rules of descent, as stated in the preceding chapter, also affect the rules of escheat mentioned in this paragraph. An escheat may now be said to take place when there is neither an heir to the last purchaser of the lands nor to the person last entitled.

kind to be such an issue, as shall entitle the husband to be tenant by the curtesy, because it is not capable of inheriting. And therefore, if there appears no other heir than such a prodigious birth, the land shall escheat to the lord.

5. Bastards are incapable of being heirs. Bastards, by our law, are such children as are not born either in lawful wedlock, or within a competent time after its determination. Such are held to be *nullius filii*, the sons of nobody; for the maxim of law is, *qui ex damnato coitu nascuntur, inter liberos non computantur*. Being thus the sons of nobody, they have no blood in them, at least no inheritable blood: consequently, none of the blood of the first purchaser: and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord. The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after its birth the mother was married to the father: and also, if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet she and her bastard son were admitted each to one-twelfth of the inheritance; and a bastard was likewise *capable of succeeding to the whole of his mother's es- [*248 tate, although she was never married; the mother being sufficiently certain, though the father is not. But our law, in favor of marriage, is much less indulgent to bastards. * * * *

*As bastards cannot be heirs themselves, so neither [*249 can they have any heirs but those of their own bodies. For, as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred; and, consequently, can have no legal heirs, but such as claim by a lineal descent from himself. And therefore if a bastard purchases land and dies seized thereof without issue, and intestate, the land shall escheat to the lord of the fee.⁴

6. Aliens, also, are incapable of taking by descent, or inheriting: for they are not allowed to have any inheritable blood in

⁴ As already mentioned, the common-law rules in regard to inheritance by and from illegitimate children have been changed by statute in a number of the United States, especially as applying to mothers and their bastard children, who are now not uncommonly allowed to inherit from each other. (See *ante*, p. 174, n. 16.)

them ;⁵ rather indeed upon a principle of national or civil policy, than upon reasons strictly feudal. Though, if lands had been suffered to fall into their hands who owe no allegiance to the crown of England, the design of introducing our feuds, the defence of the kingdom, would have been defeated. Wherefore, if a man leaves no other relations but aliens, his land shall escheat to the lord.

As aliens cannot inherit, so far they are on a level with bastards ; but as they are also disabled to hold by purchase, they are under still greater disabilities. And, as they can neither hold by purchase, nor by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit ; but so it is expressly holden, because they have not in them any inheritable blood.

And farther, if an alien be made a denizen by the king's letters-patent and then purchases lands (which the law allows such a one to do), his son, born before his denization, shall not (by the common law) inherit those lands ; but a son born afterwards may, even though his elder brother be living ; for the father, before the denization, had no inheritable blood to communicate *250] to his eldest son ; but by denization it acquires *a hereditary quality, which will be transmitted to his subsequent posterity. Yet if he had been naturalized by act of parliament, such *eldest son* might then have inherited ; for that cancels all defects, and is allowed to have a *retrospective* energy, which simple *denization* has not.⁶

Sir Edward Coke also holds, that if an alien cometh into England, and there hath issue two sons, who are thereby natural-born subjects ; and one of them purchases land, and dies ; yet neither of these brethren can be heir to the other. For the *commune vinculum*, or common stock of their consanguinity, is the father ; and as he had no inheritable blood in him, he could communicate none to his sons ; and, when the sons can by no possibility be heirs to the father, the one of them shall not be heir to the other. And this opinion of his seems founded upon solid principles of the ancient law : not only from the rule be-

⁵ The changes in the law upon this subject have been already stated (See *ante*, p. 119, note 2.)

⁶ See in regard to naturalization, *ante*, p. 122, note 4.

fore cited, that *cestui, que doit inheriter al pere, doit inheriter al fils*; but also because we have seen that the only feudal foundation, upon which newly purchased land can possibly descend to a brother, is the supposition and fiction of law, that it descended from some one of his ancestors; but in this case, as the intermediate ancestor was an alien, from whom it could in no possibility descend, this should destroy the supposition, and impede the descent, and the land should be inherited *ut feudum stricte novum*; this is, by none but the lineal descendants of the purchasing brother; and on failure of them, should escheat to the lord of the fee. But this opinion hath been since overruled; and it is now held for law, that the sons of an alien born here, may inherit to each other; the descent from one brother to another being an *immediate* descent.⁷ And reasonably enough upon the whole; for, as (in common purchases) the whole of the supposed descent from indefinite ancestors is but fictitious, the law may as well suppose the requisite ancestor as suppose the requisite descent.

* It is also enacted, by the statute 11 & 12 Wm. III., ch. 6, [*251 that all persons, being natural-born subjects of the king, may inherit and make their titles by descent from any of their ancestors, lineal or collateral; although their father or mother, or other ancestor, by, from, through, or under whom they derive their pedigrees, were born out of the king's allegiance. But inconveniences were afterwards apprehended, in case persons should thereby gain a future capacity to inherit, who did not exist at the death of the person last seized. As, if Francis the elder brother of John Stiles be an alien, and Oliver the younger be a natural-born subject, upon John's death without issue his lands will descend to Oliver the younger brother: now, if afterwards Francis has a child born in England, it was feared that, under the statute of King William, this new-born child might defeat the estate of his uncle Oliver. Wherefore it is provided, by the statute 25 Geo. II., ch. 39, that no right of inheritance shall accrue by virtue of the former statute to any persons whatsoever, unless they are in being and capable to take as heirs at the death of the person last seized:—with an exception however to the case, where lands shall descend to the daughter of an alien; which

⁷ See *ante*, p. 395 note 9.

descent shall be divested in favor of an after-brother, or the inheritance shall be divided with an after-born sister or sisters, according to the usual rule of descents by the common law.

7. By attainder also, for treason or other felony, the blood of the person attainted is so corrupted, as to be rendered no longer inheritable.

Great care must be taken to distinguish between forfeiture of lands to the king, and this species of escheat to the lord ; which, by reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon law, as a part of punishment *252] for the offence ; *and does not at all relate to the feudal system, nor is the consequence of any signiory or lordship paramount : but, being a prerogative vested in the crown, was neither superseded nor diminished by the introduction of the Norman tenures ; a fruit and consequence of which, escheat must undoubtedly be reckoned. Escheat therefore operates in subordination to this more ancient and superior law of forfeiture.⁸

The doctrine of escheat upon attainder, taken singly, is this : that the blood of the tenant, by the commission of any felony (under which denomination all treasons were formerly comprised), is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit*. Upon the thorough demonstration of which guilt, by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and

⁸ By statute 33 & 34 Vict., ch. 23 [1870], it is provided that no conviction, or judgment for treason or felony, shall cause any attainder or corruption of blood or any *forfeiture or escheat*, except that the law of forfeiture, in cases of outlawry, is not changed. The rules of escheat, in cases of attainder, are therefore now abrogated.

In the United States it is provided, by the Federal Constitution, that "Congress shall have power to declare the punishment of treason ; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted." (Art. 3, § 3 ; see *post*, page 1036, note 1.)

blotted out forever. In this situation the law of feudal escheat was brought into England at the Conquest; and in general superadded to the ancient law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revert in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage: in case of treason, forever; in case of other felony, for only a year and a day; after which time it goes to the lord in a regular course of escheat, as it would have done to the heir of the felon, in case the feudal tenures had never been introduced. And that this is the true operation and genuine history of escheats will most evidently appear from this incident to gavelkind lands (which seems to be the old Saxon tenure), that they are in no case subject to escheat for felony, though they are liable to forfeiture for treason.

*As a consequence of this doctrine of escheat, all lands [*253 of inheritance immediately reverting in the lord, the wife of the felon was liable to lose her dower, till the statute 1 Edw. VI., ch. 12, enacted, that albeit any person be attainted of misprision of treason, murder, or felony, yet his wife shall enjoy her dower. But she has not this indulgence where the ancient law of forfeiture operates, for it is expressly provided by the statute 5 & 6 Edw. VI., ch. 11, that the wife of one attainted of high treason shall not be endowed at all.

Hitherto we have only spoken of estates vested in the offender at the time of his offence or attainder. And here the law of forfeiture stops; but the law of escheat pursues the matter still farther. For the blood of the tenant being utterly corrupted and extinguished, it follows not only that all that he now has shall escheat from him, but also that he shall be incapable of inheriting any thing for the future. This may farther illustrate the distinction between forfeiture and escheat. If therefore a father be seized in fee, and the son commits treason and is attainted and then the father dies: here the lands shall escheat to the lord; because the son, by the corruption of his blood, is incapable to be heir, and there can be no other heir during his life; but nothing shall be forfeited to the king, for the son never had any interest in the lands to forfeit. In this case the escheat operates, and not the forfeiture; but in the following instance the

forfeiture works, and not the escheat. As where a new felony is created by act of parliament and it is provided (as is frequently the case) that it shall not extend to corruption of blood; here the lands of the felon shall not escheat to the lord, but yet the profits of them shall be forfeited to the king for a year and a day, and so long after as the offender lives.

There is yet a farther consequence of the corruption and extinction of hereditary blood, which is this: that the person *254] *attainted shall not only be incapable himself of inheriting, or transmitting his own property by heirship, but shall also obstruct the descent of lands or tenements to his posterity, in all cases where they are obliged to derive their title through him from any remoter ancestor. The channel which conveyed the hereditary blood from his ancestors to him, is not only exhausted for the present, but totally dammed up and rendered impervious for the future. This is a refinement upon the ancient law of feuds, which allowed that the grandson might be heir to his grandfather, though the son in the intermediate generation was guilty of felony. But, by the law of England, a man's blood is so universally corrupted by attainder, that his sons can neither inherit to him nor to any other ancestors, at least on the part of their attainted father.

This corruption of blood cannot be absolutely removed but by authority of parliament. The king may excuse the public punishment of an offender; but cannot abolish the private right, which has accrued or may accrue to individuals as a consequence of the criminal's attainder. He may remit a forfeiture, in which the interest of the crown is alone concerned; but he cannot wipe away the corruption of blood: for therein a third person hath an interest, the lord who claims by escheat. If therefore a man hath a son, and is attainted, and afterwards pardoned by the king; this son can never inherit to his father, or father's ancestors: because his paternal blood, being once thoroughly corrupted by his father's attainder, must continue so: but if the son had been born after the pardon, he might inherit; because by the pardon the father is made a new man, and may convey new inheritable blood to his after-born children.

Herein there is however a difference between aliens and persons attainted. Of aliens, who could never by any possibility be *255] heirs, the law takes no notice: and therefore we have *seen,

that an alien elder brother shall not impede the descent to a natural-born younger brother. But in attainders it is otherwise: for if a man hath issue a son, and is attainted, and afterwards pardoned, and then hath issue a second son, and dies: here the corruption of the blood is not removed from the eldest, and therefore he cannot be heir; neither can the youngest be heir, for he hath an elder brother living, of whom the law takes notice, as he once had a possibility of being heir: and therefore the younger brother shall not inherit, but the land shall escheat to the lord: though had the elder died without issue in the life of the father, the younger son born after the pardon might well have inherited, for he hath no corruption of blood. So if a man hath issue two sons, and the elder in the lifetime of the father hath issue, and then is attainted and executed, and afterwards the father dies, the lands of the father shall not descend to the younger son: for the issue of the elder, which had once a possibility to inherit, shall impede the descent to the younger, and the land shall escheat to the lord. Sir Edward Coke in this case allows, that if the ancestor be attainted, his sons born before the attainder may be heirs to each other; and distinguishes it from the case of the sons of an alien, because in this case the blood was inheritable when imparted to them from the father; but he makes a doubt (upon the principles before mentioned, which are now over-ruled) whether sons, born after the attainder, can inherit to each other, for they never had any inheritable blood in them.

Upon the whole it appears, that a person attainted is neither allowed to retain his former estate, not to inherit any future one, nor to transmit any inheritance to his issue, either immediately from himself, or mediately through himself from any remoter ancestor; for his inheritable blood, which is necessary either to hold, to take, or to transmit any feudal property, is blotted out, corrupted, and extinguished for ever: the consequence of which is, that estates thus impeded in their descent, result back and escheat to the lord.

* This corruption of blood, thus arising from feudal [*256 principles, but perhaps extended farther than even those principles will warrant, has been long looked upon as a peculiar hardship: because the oppressive part of the feudal tenures being now in general abolished, it seems unreasonable to reserve one

of their most inequitable consequences ; namely, that the children should not only be reduced to present poverty (which, however severe, is sufficiently justified upon reasons of public policy), but also be laid under future difficulties of inheritance, on account of the guilt of their ancestors. And therefore in most (if not all) of the new felonies created by parliament since the reign of Henry the Eighth, it is declared, that they shall not extend to any corruption of blood : and by the statute 7 Ann. ch. 21 (the operation of which is postponed by the statute 17 Geo. II., ch. 39), it is enacted, that after the death of the late Pretender, and his sons, no attainder for treason shall extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself : which provisions have indeed carried the remedy farther than was required by the hardship above complained of ; which is only the future obstruction of descents, where the pedigree happens to be deduced through the blood of an attainted ancestor.

Before I conclude this head of escheat, I must mention one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the case of a corporation ; for if that comes by any accident to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by escheat ; which is perhaps the only instance where a reversion can be expectant on a grant in fee-simple absolute. But the law, we are told, doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter ; for the cause of the gift or grant *257] *faileth.⁹ This is indeed founded upon the self-same principle as the law of escheat ; the heirs of the donor being only substituted instead of the chief lord of the fee : which was formerly very frequently the case in subinfeudations, or alienations of lands by a vassal to be holden as of himself, till that practice was restrained by the statute of *quia emptores*, 18 Edw. I., st. 1, to which this very singular instance still in some degree remains an exception.¹⁰ * * * *

⁹ See *ante*, p. 204, note. 15.

¹⁰ In the United States, the law of escheat operates to transfer the title to the property to the State in which it is situated. The principal causes of escheat are the alienage of the owner, or the failure of heirs to inherit the

These are the several deficiencies of hereditary blood, recognized by the law of England ; which, so often as they happen, occasion lands to escheat to the original proprietary or lord.

CHAPTER XVI.

[BL. COMM.—BOOK II. CH. XVI.]

II. *Of Title by Occupancy.*

OCCUPANCY is the taking possession of those things which before belonged to nobody. This, as we have seen, is the true ground and foundation of all property, or of holding those things in severalty, which by the law of nature, unqualified by that of society, were common to all mankind. But when once it was agreed that every thing capable of ownership should have an owner, natural reason suggested, that he who could first declare his intention of appropriating any thing to his own use, and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property of it ; according to that rule of the law of nations, recognized by the laws of Rome, *quod nullius est, id ratione naturali occupanti conceditur*.

This right of occupancy, so far as it concerns real property (for of personal chattels I am not in this place to speak), hath been confined by the laws of England within a very narrow compass ; and was extended only to a single instance : namely, where a man was tenant *pur autre vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of *cestui que vie*, or him by whose life it was holden ; in this case he that could first enter on the land might lawfully retain the possession, so long as *cestui que vie* lived, by right of occupancy.

property after his death. But, as in many States, the disability of alienage has been removed, escheat chiefly occurs for want of heirs. It is the general rule that a proceeding known as an “inquest of office,” or “office found,” must be instituted in behalf of the State, as at common-law, in order to vest the title in the State. But this is not true in all the States. There are diverse statutory regulations upon the subject of escheat, in the various States.

***259]** * This seems to have been recurring to first principles, and calling in the law of nature to ascertain the property of the land, when left without a legal owner. For it did not revert to the grantor, though it formerly was supposed so to do; for he had parted with all his interest, so long as *cestui que vie* lived: it did not escheat to the lord of the fee, for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it; much less of so minute a remnant as this: it did not belong to the grantee; for he was dead: it did not descend to his heirs; for there were no words of inheritance in the grant: nor could it vest in his executors; for no executors could succeed to a freehold. Belonging therefore to nobody, like the *hæreditas jacens* of the Romans, the law left it open to be seized and appropriated by the first person that could enter upon it, during the life of *cestui que vie*, under the name of an occupant. But there was no right of occupancy allowed, where the king had the reversion of the lands: for the reversioner hath an equal right with any other man to enter upon the vacant possession, and where the king's title and a subject's concur, the king's shall be always preferred: against the king therefore there could be no prior occupant, because *nullum tempus occurrit regi*. And, even in the case of a subject, had the estate *pur auter vie* been granted to a man *and his heirs* during the life of *cestui que vie*, there the heir might, and still may, enter and hold possession, and is called in law a *special occupant*: as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this *hæreditas jacens*, during the residue of the estate granted: though some have thought him so called with no very great propriety; and that such estate is rather a descendible freehold. But the title of common occupancy is now reduced almost to nothing by two statutes: the one 29 Car. II., ch. 3, which enacts (according to the ancient rule of law) that where there is no special occupant, in whom the estate may vest, the ***260]** tenant *pur auter vie* may devise it *by will, or it shall go to the executors or administrators, and be assets in their hand for payment of debts: the other, that of 14 Geo. II., ch. 20, which enacts, that the surplus of such estate *pur auter vie*, after payment of debts, shall go in a course of distribution like a chattel interest.¹

¹ These statutes have been substantially reënacted by later acts, though with slight modifications. In like manner, similar statutes have been passed

By these two statutes the title of *common* occupancy is utterly extinct and abolished ; though that of *special* occupancy by the heir at law continues to this day ; such heir being held to succeed to the ancestor's estate, not by descent, for then he must take an estate of inheritance, but as an occupant specially marked out and appointed by the original grant. But, as before the statutes there could no common occupancy be had of incorporeal hereditaments, as of rents, tithes, advowsons, commons, or the like, (because, with respect to them, there could be no actual entry made, or corporeal seizin had ; and therefore by the death of the grantee *pur auter vie* a grant of such hereditaments was entirely determined,) so now, I apprehend, notwithstanding these statutes, such grant would be determined likewise ; and the hereditaments would not be devisable, nor vest in the executors, nor go in a course of distribution. For these statutes must not be construed so as to create any new estate, or keep that alive which by the common law was determined, and thereby to defer the grantor's reversion ; but merely to dispose of an interest in being, to which by law there was no owner, and which therefore was left open to the first occupant. When there is a residue left, the statutes give it to the executors and administrators, instead of the first occupant ; but they will not *create* a residue, on purpose to give it to either. They only meant to provide an appointed instead of a casual, a certain instead of an uncertain, owner of lands which before were nobody's : and thereby to supply this *casus omissus*, and render the disposition of law in all respects entirely uniform ; this being the only instance wherein a title to real estate could ever be acquired by occupancy.

* This, I say, was the only instance ; for I think there [*261 can be no other case devised, wherein there is not some owner of the land appointed by the law. In the case of a sole corporation, as a parson of a church, when he dies or resigns, though there is no *actual* owner of the land till a successor be appointed, yet there is a *legal, potential*, ownership, subsisting in contemplation of law ; and when the successor is appointed, his appointment shall have a retrospect and relation backwards, so as to

in a number of the United States, providing that the interest of the tenant *pur auter vie* shall form part of the personal assets in the hands of executors or administrators. But, in some States, it is descenderible as real estate.

entitle him to all the profits from the instant that the vacancy commenced. And, in all other instances, when the tenant dies intestate, and no other owner of the lands is to be found in the common course of descents, there the law vests an ownership in the king, or in the subordinate lord of the fee, by escheat.

So also in some cases, where the laws of other nations give a right by occupancy, as in lands newly created, by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters ; in these instances the law of England assigns them an immediate owner. For Bracton tells us that if an island arise in the *middle* of a *river*, it belongs in common to those who have lands on each side thereof ; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore : which is agreeable to, and probably copied from, the civil law. Yet this seems only to be reasonable, where the soil of the river is equally divided between the owners of the opposite shores ; for if the whole soil is the freehold of any one man, as it usually is whenever a several fishery is claimed, there it seems just (and so is the constant practice) that the eyotts or little islands, arising in any part of the river, shall be the property of him who owneth the piscary and the soil.² However,

² A distinction must be taken in regard to title to islands rising in a river, or to soil acquired by alluvion, etc., between navigable and non-navigable rivers,—a navigable river, in the technical legal sense of the term, being one in which the tide ebbs and flows, while others are non-navigable. The term *filum aquæ* (thread of the stream) is used to denote an imaginary line passing along the centre of the river, mid-way between the banks, and dividing the soil underneath into two equal parts. If the river be non-navigable, and an island arises therein, which is divided by the *filum aquæ*, the separate portions thus divided belong in severalty (not *in common*, as by Bracton's statement quoted in the text,) to the owners of the opposite banks. Each owns the part of the island nearest his own property. If a single person owns both banks opposite the island, the whole island belongs to him. If there be a gradual deposition of soil upon one bank, and none upon the other, the thread of the stream will continually vary, so as always to constitute the central line between the banks. But if a large quantity of land, by some unusual flood, or any extraordinary casualty, be carried from one side of the river to the other, the former thread of the stream will remain unchanged, and the property of adjoining owners will have the same extent as before. But islands forming in *navigable rivers* do not belong to adjacent owners, but to the Sovereign or State. The doctrine of the *filum aquæ* is of comparatively little importance in regard to such rivers, since the soil therein belongs wholly to the State. (See *Halsey v. McCormick*, 18 N. Y. 147; *Granger v. Avery*, 64 Me. 292; *Trustees v. Dickinson*, 9 Cush. 544.)

in case a new island rise in the *sea*, though the civil law gives it to the first occupant, yet ours gives it to the king. *And [*262 as to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma*: or by *dereliction*, as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*: and, besides, these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king: for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry. So that the quantity of ground gained, and the time during which it is gaining, are what make it either the king's or the subject's property. In the same manner if a river, running between two lordships, by degrees gains upon the one, and thereby leaves the other dry; the owner who loses his ground thus imperceptibly has no remedy: but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, it is said that he shall have what the river has left in any other place, as a recompense for this sudden loss. And this law of alluvions and derelictions, with regard to *rivers*, is nearly the same in the imperial law; from whence indeed those our determinations seem to have been drawn and adopted: but we ourselves, as islanders, have applied them to *marine* increases; and have given our sovereign the prerogative he enjoys, as well upon the particular reasons before mentioned, as upon this other general ground of prerogative, which was formerly remarked, that whatever hath no other owner is vested by law in the king.

In some States, however, navigability is not determined by tidal flow, but large rivers, so far as they are capable of actual navigation, are held navigable even above tide-water, and their beds are deemed to belong to the State. (*Barney v. Keokuk*, 94 U. S. 324; *Buffalo, &c. Co. v. N. Y. Central R. Co.*, 10 Abb. N. C. 107; *Storer v. Jack*, 60 Pa. St. 339; Washburn, Real Pr. III., 60-66. 436-443 [5th ed.])

CHAPTER XVII.

[BL. COMM.—BOOK II. CH. XVII.]

III. Of Title by Prescription.

A THIRD method of acquiring real property by purchase is that by *prescription*; as when a man can show no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it. Concerning customs, or immemorial usages, in general, with the several requisites and rules to be observed, in order to prove their existence and validity, we inquired at large in the preceding part of these Commentaries. At present therefore I shall only, first, distinguish between *custom*, strictly taken, and *prescription*; and then show what sort of things may be prescribed for.

And, first, the distinction between custom and prescription is this; that custom is properly a *local* usage, and not annexed to a *person*; such as a custom in the manor of Dale that lands shall descend to the youngest son: prescription is merely a *personal* usage; as, that Sempronius and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege. As for example; if there be a usage in the parish of Dale, that all the inhabitants of that parish may dance on a certain close, at all times, for their recreation (which is held to be a lawful usage); this is strictly a custom, for it is applied to the *place* in general, and not to any particular *persons*: *264] but if the *tenant, who is seized of the manor of Dale in fee, alleges that he and his ancestors, or all those whose estate he hath in the said manor, have used time out of mind to have common of pasture in such a close, this is properly called a prescription; for this is a usage annexed to the *person* of the owner of this estate. All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath: which last is called prescribing in a *que estate*. And formerly a man might, by the common law, have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended for

an indefinite series of years. But by the statute of limitations, 32 Hen. VIII., ch. 2, it is enacted, that no person shall make any prescription by the seizin or possession of his ancestor or predecessor, unless such seizin or possession hath been within three-score years next before such prescription made.

Secondly, as to the several species of things which may, or may not, be prescribed for : we may, in the first place, observe, that nothing but incorporeal hereditaments can be claimed by prescription ; as a right of way, a common, &c. ; but that no prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had. For a man shall not be said to prescribe, that he and his ancestors have immemorially* used to hold the castle of Arundel : for this is clearly another sort of title ; a title by corporal seizin, and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription. But, as to a right of way, a common, or the like, a man may be allowed to prescribe ; for of these there is no corporal seizin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing else but immemorial usage. 2. A prescription must always be *laid in him that is tenant of the fee. [*265 A tenant for life, for years, at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates. For, as prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe for anything, whose estates commenced within the remembrance of man.¹ And therefore

¹ The period of immemorial enjoyment, which was necessary in the English law to establish a title by prescription, was deemed to run from the reign of Richard I. (1189). But as this period became unreasonably remote in the lapse of time, it became the practice to presume the existence of a grant, upon proof of an uninterrupted adverse enjoyment of the right for twenty years. This subject is now regulated in England by a positive statute (2 & 3 Will. IV., ch. 71), which specifies particular periods of possession or enjoyment as necessary to establish a right to certain classes of incorporeal hereditaments. This is known as the Prescription Act. And in the United States, adverse enjoyment, which is exclusive and uninterrupted for the space of twenty years, is usually deemed to create a title to incorporeal hereditaments by prescription. This subject is governed in a number of the States by statutory provisions, which sometimes prescribe different periods than twenty years. The enjoyment of the right or privilege in these cases must have been adverse, under a claim of right,—exclusive, continuous, and uninterrupted, and with the knowledge and acquiescence of the owner of the

the copyholder must prescribe under cover of his lord's estate, and the tenant for life under cover of the tenant in fee-simple. As if tenant for life of a manor would prescribe for a right of common as appurtenant to the same, he must prescribe under cover of the tenant in fee-simple; and must plead that John Stiles and his ancestors had immemorially used to have this right of common, appurtenant to the said manor, and that John Stiles demised the said manor, with its appurtenances, to him the said tenant for life. 3. A prescription cannot be for a thing which cannot be raised by grant. For the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed. Thus the lord of a manor cannot prescribe to raise a tax or toll upon strangers; for, as such claim could never have been good by any grant, it shall not be good by prescription. 4. A fourth rule is, that what is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises for deodands, felons' goods, and the like. These, not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by an inferior title. But the franchises of treasure-trove, waifs, estrays, and the like, may be claimed by prescription; for they arise from private contingencies, and not from any matter of record. 5. Among things incorporeal, which may be claimed by prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe in a *que estate*, or in himself and his ancestors. For, if a man prescribes in a *que estate* (that is, in himself and those whose estate he *266] holds), nothing *is claimable by this prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim anything as the consequence, or appendix of an estate, with which the thing claimed has no connection; but, if he prescribes in himself and his ancestors, he may prescribe for anything whatsoever that lies in grant; not only things that are appurtenant, but also such as may be in gross. Therefore a man may prescribe, that he, and those

estate in which the prescriptive right is claimed, and while such owner was under no disability, preventing him from resisting such enjoyment. (See Washburn on Real Property, iii. p. 56, 5th ed.)

whose estate he hath in the manor of Dale, have used to hold the advowson of Dale, as *appendant* to that manor ; but, if the advowson be a distinct inheritance, and not *appendant*, then he can only prescribe in his ancestors. So also a man may prescribe in a *que estate* for a common *appurtenant* to a manor ; but, if he would prescribe for a common *in gross*, he must prescribe in himself and his ancestors. 6. Lastly, we may observe, that estates gained by prescription are not, of course, descendible to the heirs general, like other purchased estates, but are an exception to the rule. For, properly speaking, the prescription is rather to be considered as an evidence of a former acquisition, than as an acquisition *de novo* : and therefore, if a man prescribes for a right of way in himself and his ancestors, it will descend only to the blood of that line of ancestors in whom he so prescribes ; the prescription in this case being indeed a species of descent. But, if he prescribes for it in a *que estate*, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase ; for every accessory followeth the nature of its principal.²

² The doctrine of prescription applies properly only to incorporeal hereditaments. But a similar mode of acquiring title to corporeal hereditaments has been established by statutes, known as statutes of limitation. The theory of prescription existed at common law, but that of limitation is wholly statutory. The statutes of different States differ considerably in detail, but the leading principles upon the subject are as follows : The possession of the person claiming to have acquired title must have been actual, continued, visible, notorious, distinct, and hostile, under an adverse claim of right. There must be a dispossession of the previous owner, or an occupation in exclusion of his right of possession. If the property be suitable for residence or capable of improvement, actual occupation or continued cultivation or enclosure are usually requisite as necessary to establish a title by limitation. Possession is said to be adverse when it is under claim of interest or title as against the owner, and not in subordination to his title or by his permission. The usual period of limitation is twenty years, as in cases of prescription. (See *Foulke v. Bond*, 41 N. J. L. 527 ; *Barnes v. Light*, 116 N. Y. 34 ; *Duff v. Leary*, 146 Mass. 533 ; *Riggs v. Riley*, 113 Ind. 208 ; Washburn on Real Property, III. 133-191, 5th ed.)

CHAPTER XVIII.

[BL. COMM.—BOOK II. CH. XVIII.]

IV. *Of Title by Forfeiture.*

FORFEITURE is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments; whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, hath sustained.

Lands, tenements, and hereditaments, may be forfeited in various degrees and by various means: 1. By crimes and misdemeanors. 2. By alienation contrary to law. 3. By non-presentation to a benefice, when the forfeiture is denominated a *lapse*. 4. By simony. 5. By non-performance of conditions. 6. By waste. 7. By breach of copyhold customs. 8. By bankruptcy.¹

I. The foundation and justice of forfeitures for *crimes and misdemeanors*, and the several degrees of those forfeitures proportioned to the several offences, have been hinted at in the preceding book; but it will be more properly considered, and more at large, in the fourth book of these Commentaries.² A present I shall only observe in general, that the offences which induce a forfeiture of lands and tenements to the crown are principally the following six: 1. Treason. 2. Felony. 3. Mis-*268] prison of treason. 4. *Præmunire*. *5. Drawing a weapon on a judge, or striking any one in the presence of the king's principal courts of justice. 6. Popish recusancy, or non-observance of certain laws enacted in restraint of papists. But at what time they severally commence, how far they extend, and how long they endure, will with greater propriety be reserved as the object of our future inquiries.

¹ Lapse, simony, and breach of copyhold customs, as causes of forfeiture, have been omitted in this chapter, as of little importance to the American student.

² Forfeiture for crime, except in cases of outlawry, is now abolished in English law. (Stat. 33 & 34 Vict., ch. 23.)

II. Lands and tenements may be forfeited by *alienation*, or conveying them to another, contrary to law. This is either alienation in *mortmain*, alienation to an *alien*, or alienation by *particular tenants*; in the two former of which cases the forfeiture arises from the incapacity of the alienee to take, in the latter from the incapacity of the alienor to grant.

1. Alienation in *mortmain*, in *mortua manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand, this hath occasioned the general appellation of mortmain to be applied to such alienations, and the religious houses themselves to be principally considered in forming the statutes of mortmain; in deducing the history of which statutes, it will be matter of curiosity to observe the great address and subtle contrivance of the ecclesiastics in eluding from time to time the laws in being, and the zeal with which successive parliaments have pursued them through all their finesses: how new remedies were still the parents of new evasions; till the legislature at last, though with difficulty, hath obtained a decisive victory.

By the common law any man might dispose of his lands to any other private man at his own discretion, especially when the feudal restraints of alienation were worn away. Yet in consequence of these it was always, and is still necessary for corporations to have a license in mortmain *from the crown, to [*269 enable them to purchase lands; for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats, and other feudal profits, by the vesting of lands in tenants that can never be attainted or die. And such licenses of mortmain seem to have been necessary among the Saxons, above sixty years before the Norman Conquest. But, besides this general license from the king, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the king and the alienor, to obtain his license also (upon the same feudal principles), for the alienation of the specific land. And if no such license was obtained, the king or other lord might respectively enter on the land so aliened in mortmain as a forfeiture. The necessity of this license from the crown was acknowledged by the constitu-

tions of Clarendon in respect of advowsons, which the monks always greatly coveted, as being the groundwork of subsequent appropriations. Yet such were the influence and ingenuity of the clergy, that (notwithstanding this fundamental principle), we find that the largest and most considerable dotations of religious houses happened within less than two centuries after the conquest. And (when a license could not be obtained) their contrivance seems to have been this; that, as the forfeiture for such alienations accrued in the first place to the immediate lord of the fee, the tenant who meant to alienate first conveyed his lands to the religious house, and instantly took them back again to hold as tenant to the monastery; which kind of instantaneous seizin was probably held not to occasion any forfeiture: and then by pretext of some other forfeiture, surrender, or escheat, the society entered into those lands in right of such newly-acquired seignior, as immediate lords of the fee. But, when these dotations began to grow numerous, it was observed that the feudal services, ordered for the defence of the kingdom, were every day visibly withdrawn; that the circulation of landed property **270***] from man to man began to *stagnate; and that the lords were curtailed of the fruits of their seignories, their escheats, wardships, reliefs, and the like, and therefore, in order to prevent this, it was ordained by the second of King Henry III.'s great charters, and afterwards by that printed in our common statute-books, that all such attempts should be void, and the land forfeited to the lord of the fee.

But, as this prohibition extended only to religious *houses*, bishops, and other sole corporations were not included therein; and the aggregate ecclesiastical bodies (who, Sir Edward Coke observes, in this were to be commended, that they ever had of their counsel the best learned men that they could get), found many means to creep out of this statute, by buying in lands that were *bonâ fide* holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms, for a thousand or more years, which are now so frequent in conveyances. This produced the statute *de religiosis*, 7 Edw. I.; which provided, that *no person*, religious or other whatsoever, should buy, or sell, or receive under a pretence of a gift, or term of years, or any other title whatsoever, nor should by any art or ingenuity

appropriate to himself, any lands or tenements in mortmain; upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount, and, in default of all of them, the king, might enter thereon as a forfeiture.

This seemed to be a sufficient security against all alienations in mortmain; but as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land, which it was intended they should have, and to bring an *action to recover it against [*271 the tenant; who, by fraud and collusion, made no defence, and thereby judgment was given for the religious house, which then recovered the land by sentence of law upon a supposed prior title. And thus they had the honor of inventing those fictitious adjudications of right, which are since become the great assurance of the kingdom, under the name of *common recoveries*. But upon this the statute of Westminster the second, 13 Ed. I. ch. 32, enacted, that in such cases a jury shall try the true right of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seizin; otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter, in case the tenants set up crosses upon their lands (the badges of knights templar and hospitalers), in order to protect them from the feudal demands of their lords, by virtue of the privileges of those religious and military orders. So careful indeed was this provident prince to prevent any future evasions, that when the statute of *quia emptores*, 18 Edw. I., abolished all subinfeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord, a proviso was inserted, that this should not extend to authorize any kind of alienation in mortmain. And when afterwards the method of obtaining the king's license by writ of *ad quod damnum* was marked out, by the statute 27 Ed. I., st. 2, it was further provided by statute 34 Ed. I., st. 3, that no such license should be effectual, without the consent of the mesne or intermediate lords.

Yet still it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of all their former holds, they devised a new method of conveyance, by which the

lands were granted, not to themselves directly, but to nominal feoffees *to the use of* the religious houses ; thus distinguishing *272] between the *possession* and the *use*, and receiving *the actual profits, while the seizin of the land remained in the nominal feoffee ; who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his *cestui que use* for the rents and emoluments of the estate. And it is to these inventions that our practicers are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But, unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device ; for the statute 15 Ric. II., ch. 5, enacts, that the lands which had been so purchased to uses should be amortised by license from the crown or else be sold to private persons ; and that, for the future, uses shall be subject to the statutes of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land, adjoining to churches, and consecrating them by the name of church-yards, such subtle imagination is also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws. And, lastly, as during the times of popery, lands were frequently given to superstitious uses, though not to any corporate bodies ; or were made liable in the hands of heirs and devisees to the charge of obits, chaunteries, and the like, which were equally pernicious in a well-governed state as actual alienations in mortmain ; therefore, at the dawn of the Reformation, the statute 23 Hen. VIII. ch. 10, declares, that all future grants of lands for any of the purposes aforesaid, if granted for any longer term than twenty years, shall be void.

But, during all this time, it was in the power of the crown, by granting a license of mortmain, to remit the forfeiture, so far as related to its own rights ; and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity ; which prerogative is declared and confirmed by the statute 18 Edw. III., st. 3, ch. 3. But, as doubts were conceived at the time of the Revolution how far such license was valid since *273] the kings had no *power to dispense with the statutes of mortmain by a clause of *non obstante* which was the usual course,

though it seems to have been unnecessary : and as, by the gradual declension of mesne signiories through the long operation of the statute of *quia emptores*, the rights of intermediate lords were reduced to a very small compass ; it was therefore provided by the statute 7 & 8 Wm. III., ch. 37, that the crown for the future at its own discretion may grant licenses to alien or take in mortmain, of whomsoever the tenements may be holden.

After the dissolution of monasteries under Henry VIII., though the policy of the next popish successor affected to grant a security to the possessors of abbey lands, yet, in order to regain so much of them as either, the zeal or timidity of their owners might induce them to part with, the statutes of mortmain were suspended for twenty years by the statute 1 & 2 P. & M. ch. 8, and during that time, any lands or tenements were allowed to be granted to any spiritual corporation without any license whatsoever. And, long afterwards, for a much better purpose, the augmentation of poor livings, it was enacted by the statute 17 Car. II. ch. 3, that appropriators may annex the great tithes to the vicarages ; and that all benefices under 100*l. per annum* may be augmented by the purchase of lands, without license of mortmain in either case ; and the like provision hath been since made, in favor of the governors of Queen Anne's bounty. It hath also been held that the statute 23 Hen. VIII. before mentioned did not extend to any thing but *superstitious* uses ; and that therefore a man may give lands for the maintenance of a school, a hospital, or any other *charitable* uses. But as it was apprehended from recent experience, that persons on their death-beds might make large and improvident dispositions even for these good purposes, and defeat the political ends of the statutes of mortmain ; it is therefore enacted by the statute 9 Geo. II., ch. 36, that no lands or tenements, or money to be laid out thereon, shall *be given for or charg- [*274 ed with any *charitable* uses whatsoever, unless by deed indented, executed in the presence of two witnesses twelve calendar months before the death of the donor, and enrolled in the court of chancery within six months after its execution (except stocks in the public funds, which may be transferred within six months previous to the donor's death), and unless such gift be made to take effect immediately, and be without power of revocation : and that all other gifts shall be void. The two universities, their colleges, and the scholars upon the foundation of the colleges of Eton

Winchester, and Westminster, are excepted out of this act: but such exemption was granted with this proviso, that no college shall be at liberty to purchase more advowsons, than are equal in number to one moiety of the fellows or students, upon the respective foundations.³

2. Secondly, alienation *to an alien* is also a cause of forfeiture to the crown of the land so alienated; not only on account of his incapacity to hold them, which occasions him to be passed by in descents of land, but likewise on account of his presumption in attempting by an act of his own, to acquire any real property; as was observed in the preceding book.⁴

3. Lastly, alienations *by particular tenants*, when they are greater than the law entitles them to make, and divest the remainder or reversion, are also forfeitures to him whose right is attacked thereby. As, if tenant for his own life alienes by feoffment or fine for the life of another, or in tail, or in fee, these being estates, which either must or may last longer than his own, the creating them is not only beyond his power, and inconsistent with the nature of his interest, but is also a forfeiture of his own particular estate to him in remainder or reversion. For which there seem to be two reasons. First, because such alienation amounts to a renunciation of the feudal connection and dependance; it implies a refusal to perform the due renders and services to the lord of the fee, of which fealty is constantly one, and it tends in its consequence to defeat and divest the remainder or reversion expectant: as therefore that is put in jeopardy, by such act of the particular tenant, it is but just that, upon discovery, the particular estate should be forfeited and taken from him, who has shown so manifest an inclination to make an improper use of it. The other reason is, because the particular tenant, by granting a larger estate than his own, has

³ The statutes of mortmain are not in force in the United States, except in the State of Pennsylvania, where they still exist in a modified form. It is a general rule that corporations may acquire and hold land so far as not prohibited by charter, if in other respects consistent with the purposes of their establishment. There are special statutory restrictions in regard to acquiring property by devise; but devises to corporations for charitable purposes are usually sanctioned and declared allowable, though in some States a restriction is placed upon the testator as regards the amount of the property which he may thus dispose of for such objects. (See *ante*, p. 199, note 13.)

⁴ See *ante* p. 119, note 2.

by his own act determined and put an entire end to his own original interests ; and on such determination the next taker is entitled to enter regularly, as in his remainder or reversion.⁶ The same law, which is thus laid down with regard to tenants for life, holds also with respects to all tenants of the mere freehold or of chattel interests ; but if tenant in tail alienes in fee, this is no immediate forfeiture to the remainder-man, but a mere *discontinuance* (as it is called) of the estate-tail, which the issue may afterwards avoid by due course of law : for he in remainder or reversion hath only a very remote and barely possible interest therein, until the issue in tail is extinct. But, in case of such forfeitures by particular tenants, all legal estates by them before created, as if tenant for twenty years grants a lease for fifteen, and all charges by him lawfully made on the lands, shall be good and available in law. For the law will not hurt an innocent lessee for the fault of his lessor ; nor permit the lessor, after he has granted a good and lawful estate, by his own act to avoid it, and defeat the interest which he himself has created.

Equivalent, both in its nature and its consequences, to an illegal alienation by the particular tenant, is the civil crime of *disclaimer* ; as where a tenant, who holds of any lord, neglects to render him the due services, and, upon an action brought to recover them, disclaims to hold of his lord. Which disclaimer of tenure in any court of record is a forfeiture of the lands to the lord upon reasons most apparently feudal. And so likewise, if in any court of record the *particular tenant does any act [*276 which amounts to a virtual disclaimer ; if he claims any greater estate than was granted him at the first infeudation, or takes upon himself those rights which belong only to tenants of a superior class ; if he affirms the reversion to be in a stranger, by accepting his fine, attorning as his tenant, collusive pleading, and the like ; such behavior amounts to a forfeiture of his particular estate.†

*V. The next kind of forfeitures are those by *breach* [*284

⁶ But now it is provided by statute in England, that no feoffment shall have a tortious operation, so that forfeiture for this cause cannot now occur. In a number of the United States it is provided that the conveyance by a tenant of a greater interest or estate than he possesses, shall not operate to occasion a forfeiture, but shall only have the effect to transfer the interest to which he is actually entitled.

† As to disclaimer, see *Delancey v. Ganong*, 9 N. Y. 9 ; Washburn on Real Prop. I. 126, 601, 5th ed.

or non-performance of a *condition* annexed to the estate, either expressly by deed at its original creation, or impliedly by law from a principle of natural reason. Both which we considered at large in a former chapter.

VI. I therefore now proceed to another species of forfeiture, *viz.* by *waste*. Waste, *vastum*, is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail.⁶

Waste is either *voluntary*, which is a crime of commission, as by pulling down a house; or it is *permissive*, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste. Therefore removing wainscot, floors, or other things once fixed to the freehold of a house, is waste. If a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste: but otherwise, if the house be burnt by the carelessness or negligence of the lessee: though now by the statute 6 Ann., ch. 31, no action will lie against a tenant for an accident of this kind. Waste may also be committed in ponds, dove-houses, warrens, and the like; by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance. Timber also is a part of the inheritance. Such are oak, ash, and elm in all places; and in some particular countries by local custom, where other trees are generally used for building they are for that reason considered as timber; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste. But underwood the tenant may cut down *282] at any seasonable time *that he pleases; and may take sufficient estovers of common right for house-bote and cart-bote; unless restrained (which is usual) by particular covenants or exceptions. The conversion of land from one species to another is waste. To convert wood, meadow, or pasture, into arable; to turn arable, meadow, or pasture, into woodland; or to turn arable or woodland into meadow or pasture, are all of them waste. For, as Sir Edward Coke observes, it not only changes the course of husbandry, but the evidence of the estate; when such a close, which is conveyed and described as pasture, is found to be arable and *e converso*. And the same rule is observed, for the same

reason, with regard to converting one species of edifice into another, even though it is improved in its value. To open the land to search for mines of metal, coal, &c. is waste; for that is a detriment to the inheritance: but if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use; for it is now become the mere annual profit of the land. These three are the general heads of waste, *viz.* in houses, in timber, and in land. Though, as was before said, whatever else tends to the destruction, or depreciating the value of the inheritance, is considered by the law as waste.

Let us next see, who are liable to be punished for committing waste. And by the feudal law, feuds being originally granted for life only, we find that the rule was general for all vassals or feudatories; “*si vasallus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur.*” But in our ancient common law the rule was by no means so large; for not only he that was seized of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant, save only in three persons; guardian in chivalry, tenant in dower, and tenant by the *curtesy; and not in tenant for life or years. And the [*283 reason of the diversity was, that the estate of the three former was created by the act of the law itself, which therefore gave a remedy against them; but tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee; and if he did not, it was his own default. But, in favor of the owners of the inheritance, the statutes of Marlbridge, 52 Hen. III., ch. 23, and of Gloucester, 6 Edw. I., ch. 5, provided that the writ of waste shall not only lie against tenants by the law of England (or curtesy), and those in dower, but against any farmer or other that holds in any manner for life or years. So that, for above five hundred years past, all tenants merely for life, or for any less estate, have been punishable or liable to be impeached for waste, both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment of waste, *absque impetitione vasti*: that is, with a provision or protection that no man shall *impetere*, or sue him for waste committed. But tenant in tail after possibility of issue extinct is not impeachable for waste; because his estate was at its creation an estate of inheritance, and so not within the statutes. Neither does an action

of waste lie *for the debtor* against tenant by statute, recognizance or *elegit* ; because against them the debtor may set off the damages in account : but it seems reasonable that it should lie *for the reversioner*, expectant on the determination of the debtor's own estate, or of these estates derived from the debtor.

The punishment for waste committed was, by common law and the statute of Marlbridge, only single damages ; except in the case of a guardian, who also forfeited his wardship by the provisions of the great charter ; but the statute of Gloucester directs, that the other four species of tenants shall lose and forfeit the place wherein the waste is committed, and also treble damages to him that hath the inheritance. The expression of the statute is, " he shall forfeit the *thing* which he hath wasted ; " and it hath been determined that under these words the *place* is also included. And if waste be done *sparsim*, or here and there, all over a wood, the whole wood shall be recovered ; or if in several rooms *284] of a *house, the whole house shall be forfeited ; because it is impracticable for the reversioner to enjoy only the identical places wasted, when lying interspersed with the other. But if waste be done only in one end of a wood (or perhaps in one room of a house, if that can be conveniently separated from the rest), that part only is the *locus vastatus*, or thing wasted, and that only shall be forfeited to the reversioner.

VIII. The eighth and last method whereby lands and tenements may become forfeited, is that of *bankruptcy*, or the act of becoming a bankrupt : which unfortunate person may, from the several descriptions given of him in our statute law, be thus defined ; a trader who secretes himself, or does certain other acts, tending to defraud his creditors.

Who shall be such a trader, or what acts are sufficient to denominate him a bankrupt, with the several connected consequences resulting from that unhappy situation, will be better considered in a subsequent chapter ; when we shall endeavor more fully to explain its nature, as it most immediately relates to personal goods and chattels. I shall only here observe the manner in which the property of lands and tenements is transferred, upon the supposition that the owner of them is clearly and indisputably a bankrupt, and that a commission of bankrupt is awarded and issued against him.

⁶ See in regard to waste. *ante* p. 304, note 1.

By statute 13 Eliz., ch. 7, the commissioners for that purpose, when a man is declared a bankrupt, shall have full power to dispose of all his lands and tenements, which he had in his own right at the time when he became a bankrupt, or which shall descend or come to him at any time afterwards, before his debts are satisfied or agreed for; and all lands and tenements which were purchased by him jointly with his wife or children to his own use (or such interest therein as *he may lawfully part [*286 with,) or purchased with any other person upon secret trust for his own use; and to cause them to be appraised to their full value, and to sell the same by deed indented and enrolled, or divide them proportionably among the creditors. This statute expressly included not only free, but customary and copyhold lands; but did not extend to estates-tail, farther than for the bankrupt's life; nor to equities of redemption on a mortgaged estate, wherein the bankrupt has no legal interest, but only an equitable reversion. Whereupon the statute 21 Jac. I., ch. 19, enacts, that the commissioners shall be empowered to sell or convey, by deed indented and enrolled, any lands or tenements of the bankrupt, wherein he shall be seized of an estate-tail in possession, remainder, or reversion, unless the remainder or reversion thereof shall be in the crown; and that such sale shall be good against all such issues in tail, remainder-men, and reversioners, whom the bankrupt himself might have barred by a common recovery, or other means; and that all equities of redemption upon mortgaged estates, shall be at the disposal of the commissioners; for they shall have power to redeem the same as the bankrupt himself might have done, and after redemption to sell them. And also by this and a former act all fraudulent conveyances to defeat the intent of these statutes are declared void; but that no purchaser *bona fide*, for a good or valuable consideration, shall be affected by the bankrupt laws, unless the commission be sued forth within five years after the act of bankruptcy committed.

By virtue of these statutes a bankrupt may lose all his real estates; which may at once be transferred by his commissioners to their assignees without his participation or consent¹.

¹ The present English law of bankruptcy, as well as the law of the United States upon the same subject, is fully considered in a subsequent chapter, to which reference may be made. (See *post*, chap. XXX.)

CHAPTER XIX.

[BL. COMM.—BOOK II. CH. XIX.]

V. *Of Title by Alienation.*

THE most usual and universal method of acquiring a title to real estates is that of alienation, conveyance, or purchase in its limited sense ; under which may be comprised any method wherein estates are voluntarily resigned by one man, and accepted by another ; whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties.

This means of taking estates by alienation, is not of equal antiquity in the law of England with that of taking them by descent. For we may remember that, by the feudal law a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord ; lest thereby a feeble or suspicious tenant might have been substituted and imposed upon him to perform the feudal services, instead of one on whose abilities and fidelity he could depend. Neither could the feudatory then subject the land to his debts ; for if he might, the feudal restraint of alienation would have been easily frustrated and evaded. And, as he could not aliene it in his lifetime, so neither could he by will defeat the succession, by devising his feud to another family ; nor even alter the course of it, by imposing particular limitations, or prescribing an unusual path of descent. Nor, in short, could he aliene the estate, even with the consent of the lord, unless he had also obtained the consent of his own next apparent, or presumptive heir. And therefore it was very *288] usual in ancient feoffments to express that *the alienation was made by consent of the heirs of the feoffor : sometimes for the heir apparent himself to join with the feoffor in the grant. And, on the other hand, as the feudal obligation was looked upon to be reciprocal, the lord could not alien or transfer his signiory without the consent of his vassal : for it was esteemed unreasonable to subject a feudatory to a new superior, with whom he

might have a deadly enmity, without his own approbation ; or even to transfer his fealty, without his being thoroughly apprised of it, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent, from a hostile seizing of his cattle by the lord of a neighboring clan. This consent of the vassal was expressed by what was called *attorning* or professing to become the tenant of the new lord : which doctrine of attornment was afterwards extended to all lessees for life or years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or tenant refused to attorn to the purchaser, and to become his tenant, the grant or contract was in most cases void, or at least incomplete : which was also an additional clog upon alienations.

But by degrees this feudal severity is worn off ; and experience hath shown, that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained. The road was cleared in the first place by a law of King Henry the First, which allowed a man to sell and dispose of lands which he himself had purchased ; for over these he was thought to have a more extensive power than over what had been transmitted to him in a course of descent from his ancestors ; *a doctrine which [*289 is countenanced by the feudal constitutions themselves ; but he was not allowed to sell the whole of his own acquisitions, so as totally to disinherit his children, any more than he was at liberty to aliene his paternal estate. Afterwards a man seems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his *assigns* by name ; but, if his *assigns* were not specified in the purchase deed, he was not empowered to aliene : and also he might part with one-fourth of the inheritance of his ancestors without the consent of his heir. By the great charter of Henry III., no subinfeudation was permitted of part of the land, unless sufficient was left to answer the services due to the superior lord, which sufficiency was probably interpreted to be one-half or moiety of the land. But these restrictions were in general removed, by the statute *quia emptores*, whereby all persons, except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion. And even these tenants *in capite* were by the statute 1 Edw. III., ch. 12, permitted to aliene, on paying a fine to the king.

By the temporary statutes 7 Hen. VII., ch. 3, and 3 Hen. VIII., ch. 4, all persons attending the king in his wars were allowed to aliene their lands without license, and were relieved from other feudal burdens. And, lastly, these very fines for alienations were, in all cases of freehold tenure, entirely abolished by the statute 12 Car. II., ch. 24. As to the power of *charging* lands with the debts of the owner, this was introduced so early as stat. Westm. 2, which subjected a *moiety* of the tenant's lands to executions, for debts recovered by law: as the *whole* of them was likewise subjected to be pawned in a statute merchant by the statute *de mercatoribus*, made the same year, and in a statute staple by statute 27 Edw. III., ch. 9, and in other similar recognizances by statute *290] *23 Hen. VIII., ch. 6. And now, the whole of them is not only subject to be *pawned* for the debts of the owner, but likewise to be absolutely *sold* for the benefit of trade and commerce by the several statutes of bankruptcy. The restraint of *devising* lands by will, except in some places by particular custom, lasted longer; that not being totally removed, till the abolition of the military tenure. The doctrine of *attornments* continued still later than any of the rest, and became extremely troublesome, though many methods were invented to evade them; till at last they were made no longer necessary to complete the grant or conveyance, by statute 4 and 5 Ann., ch. 16; nor shall, by statute 11 Geo. II., ch. 19, the attornment of any tenant affect the possession of any lands, unless made with consent of the landlord, or to a mortgagee after the mortgage is forfeited, or by direction of a court of justice.

In examining the nature of alienation, let us first inquire, briefly, *who* may aliene, and to *whom*; and then, more largely, *how* a man may aliene, or the several modes of conveyance.

I. Who may aliene, and to whom: or, in other words, who is capable of conveying and who of purchasing. And herein we must consider rather the incapacity, than capacity, of the several parties: for all persons in *possession* are *prima facie* capable both of conveying and purchasing, unless the law has laid them under any particular disabilities. But, if a man has only in him the *right* of either possession or property, he cannot convey it to any other, lest pretended titles might be granted to great men, whereby justice might be trodden down, and the weak oppressed.¹

¹ The common-law rule that a conveyance of lands by an owner, who has

Yet reversions and vested remainders may be granted; because the possession of the particular tenant is the possession of him in reversion or remainder; but *contingencies*, and mere *possibilities*, though they may be released, or devised by will, or may pass to the heir or executor, yet cannot (it hath been said) be assigned to a stranger, unless coupled with some present interest.²

Persons attainted of treason, felony, and *præmunire*, are incapable of conveying, from the time of the offence committed, provided attainder follows: for such conveyance by them may tend to defeat the king of his forfeiture, or the *lord of his es- [*291 cheat.³ But they may *purchase* for the benefit of the crown, or the lord of the fee, though they are disabled to *hold*; the lands so purchased, if after attainder, being subject to immediate forfeiture; if before, to escheat as well as forfeiture, according to nature of the crime. So also corporations, religious or others, may purchase lands; yet, unless they have a license to hold in mortmain, they cannot retain such purchase; but it shall be forfeited to the lord of the fee.

Idiots and persons of non-sane memory, infants and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only. For their conveyances and purchases are voidable, but not actually void. The king indeed, on behalf of an idiot, may avoid his grants or other acts. But it hath been said, that a *non compos* himself, though he be afterwards brought to a right

been evicted or ousted of possession by another, who holds adversely under claim of title, is void, as the transfer of a "pretended title," is still recognized and enforced in a considerable number of the United States. In some States, however, it has been abolished by statute. The evil of such conveyances was deemed to be that they promoted contention and litigation; and this was regarded as so injurious in tendency and so detrimental on grounds of public policy, that it was held to be a legal offense, and was termed technically "maintenance." The rigid laws of early times against maintenance have been considerably relaxed, both in England and in this country, but not, as a general rule, wholly abrogated. (See *post*, p. 906; Washburn on Real Prop. III. 349, 5th ed.)

² The law upon this subject has been changed by recent statutes; and mere rights of entry or of property without any estate, contingent interests, and the like, are now declared to be both devisable and alienable by deed. Provisions of a similar nature have been made in some of the United States by statute. (Washburn on Real Prop. III. 104, 370, 5th ed.)

³ Since attainder for crime is now abolished, this disability evidently no longer exists.

mind, shall not be permitted to allege his own insanity in order to avoid such grant: for that no man shall be allowed to stultify himself, or plead his own disability. The progress of this notion is somewhat curious. In the time of Edward I., *non compos* was a sufficient plea to avoid a man's own bond: and there is a writ in the register for the alienor himself to recover lands aliened by him during his insanity; *dum fuit non compos mentis suæ, ut dicit, &c.* But under Edward III., a scruple began to arise whether a man should be permitted to *blemish* himself by pleading his own insanity: and, afterwards, a defendant in assize having pleaded a release by the plaintiff since the last continuance, to which the plaintiff replied (*ore tenus*, as the manner then was) that he was out of his mind when he gave it, the court adjourned the assize; doubting, whether as the plaintiff was sane both then and at the commencement of the suit, he should be permitted to plead an intermediate deprivation of reason; and the question was asked, how he came to remember the release, if out of his senses when he gave it. Under Henry VI., this way of *292] *reasoning (that a man shall not be allowed to disable himself, by pleading his own incapacity, because he cannot know what he did under such a situation) was seriously adopted by the judges in argument; upon a question, whether the heir was barred of his right of entry by the feoffment of his insane ancestor. And from these loose authorities, which Fitzherbert does not scruple to reject as being contrary to reason, the maxim that a man shall not stultify himself hath been handed down as settled law: though later opinions, feeling the inconvenience of the rule, have in many points endeavored to restrain it.⁴ And, clearly, the next heir, or

⁴ The ancient doctrine, that no man shall be allowed to stultify himself, by pleading his own mental disability, is no longer recognized, either in England or in this country. (*Allis v. Billings*, 6 Metc. 415.) The fact of his lunacy at the time of making the conveyance, may be established by himself, as well as by his representatives, for the purpose of avoiding the deed. (*Lang v. Whidden*, 2 N. H. 435; *Crawford v. Scovell*, 94 Pa. St. 48.) It is sometimes a difficult question to determine, whether there has been sufficient impairment of mental powers, to render a deed invalid. The following remarks upon this point, in the case of *Dennett v. Dennett* (44 N. H. 538) are of interest and value: "The question, then, in all cases where incapacity to contract from defect of mind is alleged, is not whether a person's mind is impaired, nor if he is afflicted by any form of insanity, but whether the powers of his mind have been so far affected, by his disease, as to render him incapable of transacting business like that in question." "Weakness

person interested, may, after the death of the idiot or *non compos*, take advantage of his incapacity and avoid the grant. And so too, if he purchases under this disability, and does not afterwards upon recovering his senses agree to the purchase, his heir may either waive or accept the estate at his option. In like manner, an infant may waive such purchase or conveyance, when he comes to full age; or, if he does not actually agree to it, his heirs may waive it after him.⁵ Persons also, who purchase or convey under duress, may affirm or avoid such transaction, whenever the duress is ceased.⁶ For all these are under the protection of the law; which will not suffer them to be imposed upon, through the imbecility of their present condition; so that their acts are only binding, in case they be afterwards agreed to, when such imbecility ceases. Yet the guardians or committees of a lunatic, by the statute of 11 Geo. III., ch. 20, are empowered to renew in his right, under the directions of the court of chancery, any lease for lives or years, and apply the profits of such renewal for the benefit of such lunatic, his heirs or executors.⁷

The case of a feme-covert is somewhat different. She may *purchase* an estate without the consent of her husband, and the conveyance is good during the coverture, till he avoids *it [*293 by some act declaring his dissent. And, though he does nothing to avoid it, or even if he actually consents, the feme-covert herself may, after the death of her husband, waive or disagree to the

of understanding is not, of itself, any objection to the validity of a contract, if the capacity remains to see things in their true relations, and to form correct conclusions." "When it appears that a grantor has not strength of mind, and reason to understand the nature and consequences of making a deed, it may be avoided on the ground of insanity." (See 20 Fed. Rep. 756.) It is generally held that the deed of an insane person is not void, but only voidable. (79 Ind. 458; 37 N. J. L. 108; 52 Md. 602; see 49 Mich. 192.)

⁵ See *ante*, p. 183, note 6. ⁶ See *ante*, p. 70, note 4.

⁷ The term "committee" is used technically to denote the guardian or guardians appointed over an insane person by the court of chancery, after a judicial investigation has been made to ascertain the existence of insanity. The chief duties and functions of the committee are to manage the property of the insane person with prudence, and a due regard to his interests; to keep available funds profitably invested, etc.; and in the discharge of these duties, they act constantly under the supervision and control of the court. The powers of the committee, in the disposition and management of the lunatic's lands, are to a large extent governed by statute, both in England and in this country. In some States the committee is appointed by the court of probate. (See Buswell on Insanity, §§ 82-115.)

same : nay, even her heirs may waive it after her, if she dies before her husband, or if in her widowhood she does nothing to express her consent or agreement. But the *conveyance* or other contract of a feme-covert (except by some matter of record) is absolutely void, and not merely voidable ; and therefore cannot be affirmed or made good by any subsequent agreement.⁸

The case of an alien born is also peculiar. For he may purchase any thing ; but after purchase he can *hold* nothing except a lease for years of a house for convenience of merchandise, in case he be an alien friend ; all other purchases (when found by an inquest of office) being immediately forfeited to the crown.⁹

Papists, lastly, and persons professing the popish religion, and neglecting to take the oath prescribed by statute 18 Geo. III., ch. 60, within the time limited for that purpose, are by statute 11 & 12 Wm. III., ch. 4, disabled to purchase any lands, rents, or hereditaments ; and all estates made to their use, or in trust for them, are void.¹⁰

II. We are next, but principally, to inquire, *how* a man may aliene or convey ; which will lead us to consider the several modes of conveyance.

In consequence of the admission of property, or the giving a separate right by the law of society to those things which by the law of nature were in common, there was necessarily some means to be devised, whereby that separate right or exclusive property *294] should be originally acquired ; *which, we have more than once observed, was that of occupancy or first possession. But this possession, when once gained, was also necessarily to be continued ; or else, upon one man's dereliction of the thing he had seized, it would again become common, and all those mischiefs and contentions would ensue, which property was introduced to prevent. For this purpose therefore of continuing the possession, the municipal law has established *descents* and *alienations* : the former to continue the possession in the heirs of the proprietor, after his *involuntary* dereliction of it by his death ; the latter to continue it in those persons to whom the proprietor, by

⁸ As to the present state of the law upon this subject, see *ante*, p. 154, note 18.

⁹ The rules in regard to the right of aliens to acquire and transfer property, have been already stated. (See *ante*, p. 119, note 2.)

¹⁰ These disabilities are now removed.

his own *voluntary* act, should choose to relinquish it in his lifetime. A translation, or transfer, of property being thus admitted by law, it became necessary that this transfer should be properly evidenced : in order to prevent disputes, either about the fact, as whether there was any transfer at all ; or concerning the persons, by whom and to whom it was transferred ; or with regard to the subject-matter, as what the thing transferred consisted of ; or, lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made. The legal evidences of this translation of property are called the *common assurances* of the kingdom ; whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.

These common assurances are of four kinds : 1. By matter *in pais*, or deed ; which is an assurance transacted between two or more private persons *in pais*, in the country ; that is (according to the old common law), upon the very spot to be transferred. 2. By matter of *record*, or an assurance transacted only in the king's public courts of record. 3. By special *custom*, obtaining in some particular places, and relating only to some particular species of property. Which three are such as take effect during the life of the party conveying or assuring. 4. The fourth takes no effect till after his death ; and that is by *devise*, contained in his last will and testament. We shall treat of each in its order.

CHAPTER XX.

[BL. COMM. — BOOK II. CH. XX.]

*Of Alienation by Deed.**

IN treating of deeds I shall consider, first, their general nature : and, next, the several sorts or kinds of deeds, with their respective incidents. And in explaining the former, I shall examine, first, what a deed is ; secondly, its requisites ; and thirdly, how it may be avoided.

* Comprehensive statutes have recently been passed in England, in regard to conveyancing, changing in many ways the rules of the common-law. (See 44 & 45 Vict. c. 41; 45 & 46 id. c. 39.)

I. First, then, a deed is a writing sealed and delivered by the parties. It is sometimes called a charter, *carta*, from its materials ; but most usually when applied to the transactions of private subjects, it is called a deed, in Latin *factum*, κατ' ἐξουχην, because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property ; and therefore a man shall always be *estopped* by his own deed, or not permitted to aver or prove any thing in contradiction to what he has once so solemnly and deliberately avowed. If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each should be cut or indented (formerly in acute angles *instar dentium*, like the teeth of a saw, but at present in a waving line) on the top or side, to tally or correspond with the other ; which deed, so made, is called an indenture. Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some word or letters of the alphabet written between them ; through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the *296] word on *one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists ; and with us *chirographa*, or hand-writings ; the word *cirographum* or *cyrographum* being usually that which is divided in making the indenture : and this custom is still preserved in making out the indentures of a fine, whereof hereafter. But at length, indenting only has come into use, without cutting through any letters at all ; and it seems at present to serve for little other purpose, than to give name to the species of the deed. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are *counterparts* : though of late it is most frequent for all the parties to execute every part, which renders them all originals. A deed made by one party only is not indented, but *polled* or shaved quite even ; and therefore called a *deed-poll*, or a single deed.¹

¹ The chief distinction now between an indenture and a deed-poll is, that the former purports to be the act of both parties, the latter only of the grantor. A deed-poll would ordinarily commence in the following way:—
 “KNOW ALL MEN BY THESE PRESENTS, that I, A. B., in consideration of
 ————— dollars, to me paid by C. D., &c., do give, grant, bargain, and

II. We are in the next place to consider the *requisites* of a deed. The *first* of which is, that there be persons able to contract and be contracted with for the purposes intended by the deed : and also a thing, or subject-matter to be contracted for ; all which must be expressed by sufficient names. So as in every grant there must be a grantor, a grantee, and a thing granted ; in every lease a lessor, a lessee, and a thing demised.

Secondly, the deed must be founded upon good and sufficient *consideration*. Not upon a usurious contract ; nor upon fraud and collusion, either to deceive purchasers *bona fide*, or just and lawful creditors ; any of which bad considerations will vacate the deed, and subject such persons, as put the same in use, to forfeitures, and often to imprisonment. A deed also, or other grant, made without any consideration, is, as it were, of no effect : for it is construed to enure, or to be effectual, only to the use of the grantor himself.² The consideration may be either

sell unto the said C. D. and his heirs all that parcel of land, &c." An indenture would begin in this form : " THIS INDENTURE, made the ——— day of ———, in the year —, between A. B. of the first part, and C. D. of the second part, WITNESSETH, that the said A. B., for the consideration of ———dollars, etc., doth give, grant, bargain, and sell unto the said C. D., &c." An indenture has the date at the beginning, a deed-poll at the end. An actual indenting of a deed is no longer practised.

¹ But this was not true with reference to common law conveyances, as feoffments, which were effectual to convey a valid title, though made without consideration. But this mode of conveyance is no longer used, so that the exception is of no practical importance.

It is the general rule in the United States, that where an acknowledgment of the receipt of a consideration is contained in a deed, such a recital will prevent any use or trust from resulting to the grantor. It operates as an estoppel upon the parties, precluding them from impeaching the validity of the deed as an effectual conveyance. When such an acknowledgment is made, it is not, therefore, competent to prove that no consideration was in fact paid, for the purpose of destroying the effect of the deed in conveying a title. (*Grout v. Townsend*, 2 Hill, 554.) But for the purpose of recovering the purchase-money, or damages for breach of covenants in the deed, the actual consideration may be shown to be different from the consideration acknowledged. (*Bank of U. S. v. Housman*, 6 Paige, 526 ; see 6 Gray, 511 ; 112 U. S. 423 ; 2 Barb. Ch. 232.) If no consideration be expressed in the deed, the real consideration may be proved by appropriate evidence. Thus, where the consideration was stated to be " ——— dollars," testimony was allowed to be introduced to prove the amount. (*Wood v. Beach*, 7 Vt. 522, 528.) Nor is it necessary that, in acknowledging a consideration in the deed, the sum thereof should be stated. Thus, the words, " for value received," have

*297] *a *good* or a *valuable* one. A *good* consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation ; being founded on motives of generosity, prudence, and natural duty ; a *valuable* consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant : and is therefore founded in motives of justice. Deeds made upon good consideration only, are considered as merely voluntary, and are frequently set aside in favor of creditors, and *bona fide* purchasers.⁸

been held to sufficiently indicate the consideration. (*Jackson v. Alexander*, 3 Johns. 484.) So of the words, "a certain sum in hand paid." (*Jackson v. Schoonmaker*, 2 Johns. 230 ; see 44 & 45 Vict. c. 41, s. 55.)

⁸ The subject of *fraudulent conveyances* here referred to, is one of much importance. Such conveyances are declared void by two English statutes, passed in the reign of Queen Elizabeth, which have been substantially reenacted in most, if not all, the States of this country. The first of these is the statute 13 Eliz., ch. 5, and provides that all fraudulent conveyances, gifts, or alienations of lands or goods, whereby *creditors* might be in anywise disturbed, hindered, delayed, or defrauded of their just rights, are rendered utterly void ; but the Act does not extend to any estate or interest in lands, on *good consideration* and *bona fide* conveyed to any person not having notice of such fraud. The phrase, "good consideration," as used in this exception, is not confined to the restricted technical signification stated in the text, but includes both such considerations, and such as are valuable. But if this consideration is only "good," in the restricted sense of the term (*i. e.*, upon natural love and affection), the conveyance is termed "voluntary ;" and if the grantor be under indebtedness so that the disposal of the property would injuriously compromit the interests of creditors, a fraudulent intent is ordinarily presumed from the fact of conveyance, and the deed held to be void. (See *Carpenter v. Roe*, 10 N. Y. 227 ; *Dent v. Ferguson*, 132 U. S. 50 ; *Kehr v. Smith*, 20 Wall. 31 ; *Fox v. Moyer*, 54 N. Y. 125.) But a voluntary conveyance is not void by reason of a trifling indebtedness, which the grantor retains ample means to pay ; as if he owns a large surplus above the amount of his debts, and disposes of a moderate portion of this surplus. (*Cole v. Tyler*, 65 N. Y. 73 ; *Carr v. Breese*, 81 N. Y. 584 ; see 106 U. S. 260.) There will then be no sufficient ground to presume fraud. Conveyances without any consideration whatever are also termed "voluntary," and are subject to the same principles. They are mere gifts, and it is a reasonable principle enforced at law, that a "man must be just before he is generous."

The other statute is the statute 27 Eliz., ch. 4. It provides that the conveyance of any interest in lands, for the intent and purpose to defraud and deceive *bona fide purchasers* of the land for a good consideration, shall be utterly void. This differs from the other, in protecting *purchasers* instead of *creditors* ; but it, in like manner, declares valid any previous conveyance made, upon valuable consideration, to a *bona fide* purchaser. Under both

Thirdly ; the deed must be *written*, or I presume *printed*, for it may be in any character or any language ; but it must be upon paper or parchment. For if it be written on stone, board, linen, leather, or the like, it is no deed. Wood or stone may be more durable, and linen less liable to rasures ; but writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities : for there is nothing else so durable, and at the same time so little liable to alteration : nothing so secure from alteration, that is at the same time so durable. It must also have the regular *stamps* imposed on it by the several statutes for the increase of the public revenue ; else it cannot be given in evidence. Formerly many conveyances were made by parol, or word of mouth only, without writing ; but this giving a handle to a variety of frauds, the statute 29 Car. II., ch. 3, enacts, that no lease, estate or interest in lands, tenements, or hereditaments, made by livery of seizin, or by parol only (except leases, not exceeding three years from the making, and whereon the reserved rent is at least two-thirds of the real value), shall be looked upon as of greater force than a lease or estate at will ; nor shall any assignment, grant, or surrender of any interest in any freehold hereditaments be valid, unless in both cases the same be put in writing, and signed by the party granting, or his agent lawfully authorized in writing.⁴

Fourthly ; the matter written must be *legally* or *orderly* set forth : that is, there must be words sufficient to specify the agreement and bind the parties ; which *sufficiency must [*298 be left to the courts of law to determine. For it is not absolutely necessary in law to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning. But, as these statutes, the conveyance will be deemed valid as between the immediate parties thereto, and can be invalidated and set aside only in favor of creditors and purchasers. It will be binding upon the grantor and his heirs. (*Malin v. Garnsey*, 16 Johns. 189 ; *Waterbury v. Westervelt*, 9 N. Y. 598.)

⁴ By a later English statute, it has been provided that the conveyances enumerated in the text shall be made *by deed*, and not merely in writing. (Stat. 8 & 9 Vict., ch. 106.) In this country the English Statute of Frauds has been substantially reenacted in the several States, or has been assumed to be in force, though with minor differences in detail. Statutes requiring certain forms of conveyances to be *by deed*, have also been enacted. Thus, in New York, every grant of a *freehold estate* must be by deed, sealed by the grantor or his lawful agent. (1 R. S. 738, § 137.)

formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity ; and therefore I will here mention them in their usual order.

1. The *premises* may be used to set forth the number and names of the parties, with their additions or titles. They also contain the recital, if any, of such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded ; and herein also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted.

2, 3. Next come the *habendum* and *tenendum*. The office of the *habendum* is properly to determine what estate or interest is granted by the deed : though this may be performed, and sometimes is performed, in the premises. In which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises.⁶ As if a grant be “to A and the heirs of his body,” in the premises ; *habendum* “to him and his heirs for ever,” or *vice versa* ; here A has an estate-tail, and a fee-simple expectant thereon. But, had it been in the premises “to him and his heirs ;” *habendum* “to him for life,” the *habendum* would be utterly void ; for an estate of inheritance is vested in him before, the *habendum* comes, and shall not afterwards be taken away or divested by it. The *tenendum*, “and to hold,” is now of very little use, and is *299] only kept in by custom. It was sometimes formerly *used to signify the tenure by which the estate granted was to be holden ; viz. “*tenendum per servitium militare, in burgagio, in libero socagio, &c.*” But, all these being now reduced to free and common socage, the tenure is never specified. Before the statute of *quia emptores*, 18 Ed. I., it was also sometimes used to denote the lord of whom the land should be holden : but that statute directing all future purchasers to hold not of the immediate grantor, but of the chief lord of the fee, this use of the

⁶ The *habendum* may enlarge and explain, if it be not inconsistent with the premises of the deed ; but if it purports to control the estate granted, and is inconsistent with it, it is void. (*Bird v. Ireland*, 3 Wend. 99, *Mott v. Richtmyer*, 57 N. Y. 49.)

tenendum hath been also antiquated; though for a long time after we find it mentioned in ancient charters, that the tenements shall be holden *de capitalibus dominis feodi*; but as this expressed nothing more than the statute had already provided for, it gradually grew out of use.

4. Next follow the terms of stipulation, if any, upon which the grant is made: the first of which is the *reddendum* or reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted, as "rendering therefor yearly the sum of ten shillings, or a pepper-corn, or two days' ploughing, or the like." Under the pure feudal system, this render, *reditus*, return or rent, consisted in chivalry, principally of military services; in villeinage, of the most slavish offices; and in socage, it usually consists of money, though it may still consist of services, or of any other certain profit. To make a *reddendum* good, if it be of anything newly created by the deed, the reservation must be to the grantors, or some, or one of them, and not to any stranger to the deed. But if it be of ancient services or the like, annexed to the land, then the reservation may be to the lord of the fee.

5. Another of the terms upon which a grant may be made is a *condition*; which is a clause of contingency, on the happening of which the estate granted may be defeated: as "provided always, that if the mortgagor shall pay the mortgagee *500*l.* upon such a day, the whole estate granted shall [*300 determine"; and the like.

6. Next may follow the clause of *warranty*; whereby the grantor doth, for himself and his heirs, warrant and secure to the grantee the estate so granted. By the feudal constitution, if the vassal's title to enjoy the feud was disputed, he might vouch, or call the lord or donor to warrant or insure his gift; which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompense. And so, by our ancient law, if before the statute of *quia emptores* a man enfeoffed another in fee, by the feudal verb *dedi*, to hold of himself and his heirs by certain services; the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration, and equivalent for the gift), were originally stipulated to be rendered. Or if a man and his ancestors had immemorially holden land of

another and his ancestors by the service of homage (which was called *homage auncestrel*), this also bound the lord to warranty; the homage being an evidence of such a feudal grant. And, upon a similar principle, in case, after a partition or exchange of lands of inheritance, either party or his heirs be evicted of his share, the other and his heirs are bound to warranty, because they enjoy the equivalent. And so, even at this day, upon a gift in tail or lease for life, rendering rent, the donor or lessor and his heirs (to whom the rent is payable) are bound to warrant the title. But in a feoffment in fee, by the verb *dedi*, since the statute of *quia emptores*, the feoffor only is bound to the implied warranty, and not his heirs; because it is a mere personal contract on the part of the feoffor, the tenure (and of course the ancient services) resulting back to the superior lord of the fee. And in other forms of alienation, gradually introduced since that ***201**] statute, *no warranty whatsoever is implied; they bearing no sort of analogy to the original feudal donation. And therefore in such cases it became necessary to add an express clause of warranty to bind the grantor and his heirs; which is a kind of covenant real, and can only be created by the verb *warrantizo* or *warrant*.

These express warranties were introduced, even prior to the statute of *quia emptores*, in order to evade the strictness of the feudal doctrine of non-alienation without the consent of the heir. For, though he, at the death of his ancestor, might have entered on any tenements that were aliened without his concurrence, yet if a clause of warranty was added to the ancestor's grant, this covenant descending upon the heir insured the grantee; not so much by confirming his title, as by obliging such heir to yield him a recompense in lands of equal value; the law, in favor of alienations, supposing that no ancestor would wantonly disinherit his next of blood; and therefore presuming that he had received a valuable consideration, either in land or in money, which had purchased land, and that this equivalent descended to the heir together with the ancestor's warranty. So that when either an ancestor, being the rightful tenant of the freehold, conveyed the land to a stranger and his heirs, or released the right in fee-simple to one who was already in possession, and superadded a warranty to his deed, it was held that such warranty not only bound the warrantor himself to protect and assure the title of the war-

rantee, but it also bound his heir ; and this, whether that warranty was *lineal* or *collateral* to the title of the land. *Lineal* warranty was, where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor who made the warranty ; as where a father, or an elder son in the life of the father, released to the disseizor of either themselves or the grandfather, with warranty, this was lineal to the younger son. *Collateral* warranty was where the heir's title to the land neither was, nor could have been derived from the *warranting ancestor : as where a younger [*302 brother released to his father's disseizor, with warranty, this was collateral to the elder brother. But where the very conveyance to which the warranty was annexed immediately followed a disseizin, or operated itself as such (as, where a father, tenant for years, with remainder to his son in fee, aliened in fee-simple with warranty), this, being in its original manifestly founded on the *tort* or wrong of the warrantor himself, was called a warranty *commencing by disseizin* ; and being too palpably injurious to be supported, was not binding upon any heir for such tortious warrantor.

In both lineal and collateral warranty, the obligation of the heir (in case the warrantee was evicted, to yield him other lands in their stead) was only on condition that he had other sufficient lands by descent from the warranting ancestor. But though without assets, he was not bound to insure the title of *another*, yet in case of lineal warranty, whether assets descended or not, the heir was perpetually barred from claiming the land *himself* ; for if he could succeed in such claim, he would then gain assets by descent (if he had them not before), and must fulfil the warranty of his ancestor ; and the same rule was with less justice adopted also in respect of collateral warranties which likewise (though no assets descended) barred the heir of the warrantor from claiming the land by any collateral title ; upon the presumption of law that he might hereafter have assets by descent either from or through the same ancestor. The inconvenience of this latter branch of the rule was felt very early. when tenants by the curtesy took upon them to aliene their lands with warranty ; which collateral warranty of the father descending upon the son (who was the heir of both his parents), barred him from claiming his maternal inheritance ; to remedy which

the statute of Gloucester, 6 Edw. I., ch. 3, declared, that such warranty should be no bar to the son, unless assets descended from the father. It was afterwards attempted in 50 Edw. III. *303] *to make the same provision universal, by enacting, that no collateral warranty should be a bar, unless where assets descended from the same ancestor; but it then proceeded not to effect. However, by the statute 11 Hen. VII., ch. 20, notwithstanding any alienation with warranty by tenant in dower, the heir of the husband is not barred, though he be also heir to the wife. And by statute 4 and 5 Ann., ch. 16, all warranties by any tenant for life shall be void against those in remainder or reversion; and all collateral warranties by any ancestor who has no estate of inheritance in possession, shall be void against his heir. By the wording of which last statute it should seem that the legislature meant to allow, that the collateral warranty of tenant in tail in possession, descending (though without assets), upon a remainder-man or reversioner, should still bar the remainder or reversion. For though the judges, in expounding the statute *de donis*, held that, by analogy to the statute of Gloucester, a lineal warranty by the tenant in tail without assets should not bar the issue in tail, yet they held such warranty with assets to be a sufficient bar: which was therefore formerly mentioned as one of the ways whereby an estate-tail might be destroyed; it being indeed nothing more in effect than exchanging the lands entailed for others of equal value. They also held, that collateral warranty was not within the statute *de donis*: as that act was principally intended to prevent the tenant in tail from disinheriting his own issue; and therefore collateral warranty (though without assets) was allowed to be, as at common law, a sufficient bar of the estate-tail and all remainders and reversions expectant thereon. And so it still continues to be notwithstanding the statute of Queen Anne, if made by tenant in tail in possession; who therefore may now, without the forms of a fine or recovery, in some cases make a good conveyance in fee-simple, by superadding a warranty to his grant; which, if accompanied with assets, bars his own issue, and without them bars such of his heirs as may be in remainder or reversion.⁶

⁶ The doctrine of lineal and collateral warranties was abolished in England, by the statute 3 & 4 Will. IV., ch. 27 & 74. It has never prevailed in American jurisprudence.

7. *After warranty usually follow *covenants*, or con- [*304
ventions, which are clauses of agreement contained in a deed,
whereby either party may stipulate for the truth of certain facts,
or may bind himself to perform, or give, something to the other.⁷
Thus the grantor may covenant that he hath a right to convey;
or for the grantee's quiet enjoyment; or the like; the grantee
may covenant to pay his rent, or keep the premises in repair,
&c. If the covenantor covenants for himself and his *heirs*, it is
then a covenant real, and descends upon the heirs; who are
bound to perform it, provided they have assets by descent, but
not otherwise; if he covenants also for his *executors* and *admin-
istrators*, his personal assets, as well as his real, are likewise
pledged for the performance of the covenant; which makes such
covenant a better security than any warranty.⁸ It is also in some
respects a less security, and therefore more beneficial to the
grantor; who usually *covenants* only for the acts of himself and
his ancestors, whereas a general *warranty* extends to all man-

⁷ The most usual covenants, in American conveyances, are the following:
(1) That the grantor is lawfully seized of the premises described in the
deed. (2) That he has good right and lawful authority to sell and convey
the same. Covenants of seizin and of good right to convey, are virtually of the
same effect. (3) That the premises are free from incumbrances. An incum-
brance is defined as "every right to, or interest in the land, to the diminution
of the value of the land, but consistent with the passage of the fee by the
conveyance." (*Prescott v. Trueman*, 4 Mass. 627.) (4) That the grantor
will secure to the grantee the peaceable enjoyment of the premises. (5)
That the grantor will warrant the title against hostile claims. The covenant
of warranty is the broadest and most important of all. If the grantee is
evicted from the land by one having a paramount title, he is entitled to
obtain recompense from the grantor, or his representatives, for the loss thus
sustained. (6) There is a further covenant, known as the covenant for
further assurance, which has been often employed in English deeds, and to
some extent, also, in this country; this binds the grantor to a specific per-
formance of his agreement to make a good title, and does not merely render
him responsible for damages in case of breach. It is generally held that the
first three covenants are broken immediately, if at all, and do not run with
the land, but the law of some States is to the contrary. The last three relate
to the future, and are designed to guard against some future act or result.
(See 113 N. Y. 81; 100 N. Y. 471; 61 Vt. 298; 61 N. H. 23; 34 Fed. Rep.
853.) In English deeds most of these covenants are now implied. (44 & 45
Vict. c. 41.)

⁸ [The executors and administrators are bound by every covenant, without
being named, unless it is such a covenant as is to be performed personally
by the covenantor and there has been no breach before his death.]

kind. For which reasons the covenant has in modern practice totally superseded the other.

8. Lastly, comes the *conclusion*, which mentions the execution and date of the deed, or the time of its being given or executed, either expressly, or by reference to some day and year before mentioned. Not but a deed is good, although it mention no date : or hath a false date ; or even if it hath an impossible date, as the thirtieth of February ; provided the real day of its being dated or given, that is delivered, can be proved.

I proceed now to the *fifth* requisite for making a good deed : the *reading* of it. This is necessary, wherever any of the parties desire it ; and, if it be not done on his request, the deed is void as to him. If he can, he should read it himself : if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void ; at least for so much as is misrecited : unless it be agreed by collusion that the deed shall be read false, on purpose to make it void ; for in such case it shall bind the fraudulent party.⁹

***305]** *Sixthly, it is requisite that the party, whose deed it is, should *seal*,¹⁰ and now in most cases I apprehend, should *sign* it also.¹¹ The use of seals, as a mark of authenticity to letters

⁹ Although the grantor be very ignorant and illiterate, yet his deed will not be void for omission to read it to him, unless he requested such reading. If he makes such request, and the deed is read falsely in any material points, or its contents falsely stated, it is void. (*Hallenbeck v. Dewitt*, 2 Johns. 404.) But every grantor is presumed to know the contents of a deed executed by him, until proof to the contrary is adduced. And if he can read, he cannot object, after execution, that he was mistaken as to the terms of the conveyance. (See *Jackson v. Croy*, 12 Johns. 427 ; *Jackson v. Hayner*, 12 Johns. 469 ; *Eaton v. Eaton*, 37 N. J. L. 108 ; *Twambly v. Ricard*, 130 Mass. 259.)

¹⁰ In this country, the common-law seal is required in the New England States, New York, New Jersey, and a few other States ; but in a number of the Western and Southern States, a mere scroll or circle made with the pen upon the deed, is deemed a sufficient substitute for a seal. A common-law seal is defined as an impression upon wax or some tenacious substance, whether it be a wafer or any other paste or matter sufficiently tenacious to adhere and receive an impression. (See 106 U. S. 548 ; 5 Johns. 239.) A single seal may serve for several grantors in the same deed, if adopted by them as such, and if it appear by the deed to be the seal of all. (See *Mackay v. Bloodgood*, 9 Johns. 285 ; also 5 Pick. 496 ; 45 O. St. 664.)

¹¹ Signing is required in all the United States, with but very few exceptions ; and even in those States where it is not absolutely necessary, it is doubtless invariably practised. In some States the deed is required to be

and other instruments in writing, is extremely ancient. We read of it among the Jews and Persians in the earliest and most sacred records of history. And in the book of Jeremiah there is a very remarkable instance, not only of an attestation by seal, but also of the other usual formalities attending a Jewish purchase^(a). In the civil law also, seals were the evidence of truth ; and were required, on the part of the witnesses at least, at the attestation of every testament. But in the times of our Saxon ancestors they were not much in use in England. For though Sir Edward Coke relies on an instance of King Edwin's making use of a seal about a hundred years before the Conquest, yet it does not follow that this was the usage among the whole nation : and perhaps the charter he mentions may be of doubtful authority, from this very circumstance, of being sealed ; since we are assured by all our ancient historians, that sealing was not then in common use. The method of the Saxons was for such as could write to subscribe their names, and whether they could write or not, to affix the sign of the cross ; which custom our illiterate vulgar do, for the most part, to this day keep up ; by signing a cross for their mark, when unable to write their names. And indeed this inability to write, and therefore making a cross in its stead, is honestly avowed by Caedwalla, a Saxon king, at the end of one of his charters. In like manner, and for the same unsurmountable reason, the Normans, a brave but *illiterate [*306 nation, at their first settlement in France, used the practice of sealing only, without writing their names : which custom continued, when learning made its way among them, though the reason for doing it had ceased ; and hence the charter of Edward the Confessor to Westminster-abbey, himself being brought up in Normandy, was witnessed only by his seal, and is generally thought to be the oldest sealed charter of any authenticity in England. At the Conquest, the Norman lords brought over into this kingdom their own fashions ; and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross. And in the reign of Edward I. every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular *subscribed*—that is, signed at the end ; and a signature in any other place would then be ineffectual.

(a) Jeremiah, ch. xxxii. 9-11.

seals. The impressions of these seals were sometimes a knight on horseback, sometimes other devices : but coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard the First, who brought them from the crusade in the Holy Land ; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every Christian nation, who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained.

The neglect of signing, and resting only upon the authenticity of seals, remained very long among us ; for it was held in all our books that sealing alone was sufficient to authenticate a deed : and so the common form of attesting deeds,—“ *sealed* and *delivered*,” continues to this day ; notwithstanding the statute 29 Car. II., ch. 3, before mentioned revives the Saxon custom, and expressly directs the signing in all grants of lands, and many other species of deeds : in which therefore signing seems to be now as necessary as sealing, though it hath been sometimes held that the one includes the other.

A seventh requisite to a good deed is, that it be *delivered* by the party himself or his certain attorney, which therefore is *307] *also expressed in the attestation ; “ *sealed* and *delivered*.” A deed takes effect only from this tradition or delivery ; for if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing, and by a parity of reason the signing also, and makes them both his own. A delivery may be either absolute, that is, to the party or grantee himself ; or to a third person, to hold till some conditions be performed on the part of the grantee : in which last case it is not delivered as a *deed*, but as an *escrow* ; that is, as a scroll or writing, which is not to take effect as a deed till the conditions be performed ; and then it is a deed to all intents and purposes.

The *last* requisite to the validity of a deed is the *attestation*, or execution of it *in the presence of witnesses* ; though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed.¹² Our modern deeds are in reality noth-

¹² Attestation by one or more witnesses is generally required in the United States ; but while in some States it is made essential to the validity

ing more than an improvement or amplification of the *brevia testata* mentioned by the feudal writers, which were written memorandums, introduced to perpetuate the tenor of the conveyance and investiture, when grants by parol only become the foundation of frequent dispute and uncertainty. To this end they registered in the deed the persons who attended as witnesses, which was formerly done without their signing their names (that not being always in their power), but they only heard the deed read; and then the clerk or scribe added their names, in a sort of memorandum: thus: "*his testibus, Johanne Moore, Jacobo Smith, et aliis, ad hanc rem convocatis.*" This, like all other solemn transactions, was originally done only *coram paribus*, and frequently when assembled in the court-baron, hundred, or county-court; which was then expressed in the attestation, *teste comitatu, hundredo, &c.* Afterwards the attestation of other witnesses was allowed, the trial in *case of a dispute be- [*308 ing still reserved to the *pares*; with whom the witnesses (if more than one) were associated and joined in the verdict: till that also was abrogated by the statute of York, 12 Edw. II., st. 1, ch. 2. And in this manner, with some such clause of *his testibus*, are all old deeds and charters, particularly *magna charta*, witnessed. And in the time of Sir Edward Coke, creations of nobility were still witnessed in the same manner. But in the king's common charters, writs or letters-patent, the style is now altered: for at present the king is his own witness, and attests his letters-patent thus: "*Teste meipso, witness ourself at Westminster, &c.,*" a form which was introduced by Richard the First, but not commonly used till about the beginning of the fifteenth century; nor the clause of *his testibus* entirely discontinued till the reign of Henry the Eighth: which was also the era of discontinuing it in the deeds of subjects, learning being then revived, and the faculty of writing more general; and therefore ever since that of the deed, in others it is only required as a formality preliminary to the public record of the deed, to render it valid and binding as against subsequent purchasers and incumbrancers. In these latter States the deed would be valid between the parties without attestation; another formality usually required in the several States, is that of *acknowledgment* of the deed before a notary public, commissioner of deeds, or other public officer with similar powers. As in the case of attestation, acknowledgment is in some States necessary to render the deed valid, but in most only necessary in order that the deed may be recorded. The *public record* of deeds is the commonly

time the witnesses have usually subscribed their attestations, either at the bottom, or on the back of the deed.

III. We are next to consider, how a deed may be *avoided*, or rendered of no effect. And from what has been before laid down, it will follow, that if a deed wants any of the essential requisites before-mentioned; either, 1. Proper parties, and a proper subject-matter; 2. A good and sufficient consideration; 3. Writing on paper or parchment, duly stamped; 4. Sufficient and legal words, properly disposed; 5. Reading, if desired, before the execution; 6. Sealing, and, by the statute, in most cases signing also; or, 7. Delivery; it is a void deed *ab initio*. It may also be avoided by matter *ex post facto*: as, 1. By rasure, interlining, or other alteration in any material part: unless a memorandum be made thereof at the time of the execution and attestation.¹³ 2. By breaking off, or defacing the seal.¹⁴ 3. By delivering it up to *309] be cancelled; *that is, to have lines drawn over it in the form of lattice-work or *cancelli*; though the phrase is now used figuratively for any manner of obliteration or defacing it. 4. By the required practice in the United States, its purpose being to apprise subsequent purchasers and incumbrancers of the existence and contents of the deed, or to affect them with constructive notice thereof, in order that the deed may be valid as against them. The record is usually made in the office of the clerk of the county where the land is situated.

¹³ There has been much conflicting adjudication upon the point, whether an alteration in a deed shall be presumed to have been made subsequently to its execution, or before delivery. The former presumption would in many cases render the deed void, unless proof were shown that the alterations were made previous to delivery, while the latter would usually render it valid, unless the fact of subsequent alteration was established by proof. The tendency of adjudication, in recent times, is adverse to entertaining any presumption of law as to the time or intent of alteration; these questions being left to be determined by the jury upon all the evidence in the case. The general rule in this country is that the burden of proof lies upon the person claiming under the deed, to show that the alteration, if material and suspicious, is not fraudulent or fatal. If the alteration be made by the grantee after execution and be material, it avoids the deed. But if it be made by a stranger, without the privity of the party, it is termed a "spoliation" and is generally held not to vitiate the deed. After a transfer of the title by the delivery of the deed, no subsequent alteration, or even destruction of it, will operate to defeat or divest the title. (22 Wend. 388; 53 Wis. 36; 10 Wall. 26; 6 Gray, 439; 67 Pa. St. 9.) The estate having once passed, is not in this way defeasible.

¹⁴ [It must be an intentional breaking off or defacing by the party to whom the other is bound; for if the person bound break off or deface the seal, it will not avoid the deed. (*Cutts v. U. S.*, 1 Gall. 69; see 6 Cow. 746.)]

disagreement of such, whose concurrence is necessary, in order for the deed to stand : as the husband, where a feme-covert is concerned ; an infant, or person under duress, when those disabilities are removed ; and the like. 5. By the judgment or decree of a court of judicature. This was anciently the province of the court of star-chamber, and now of the chancery : when it appears that the deed was obtained by fraud, force, or other foul practice ; or is proved to be an absolute forgery. In any of these cases the deed may be voided, either in part or totally, according as the cause of avoidance is more or less extensive.

And, having thus explained the general nature of deeds, we are next to consider their several species, together with their respective incidents. And herein I shall only examine the particulars of those, which from long practice and experience of their efficacy, are generally used in the alienation of *real* estates : for it would be tedious, nay infinite, to descant upon all the several instruments made use of in *personal* concerns, but which fall under our general definition of a deed ; that is, a writing sealed and delivered. The former being, principally, such as serve to convey the property of lands and tenements from man to man, are commonly denominated *conveyances* ; which are either conveyances at *common law*, or such as receive their force and efficacy by virtue of the *statute of uses*.

I. Of conveyances by the common law, some may be called *original*, or *primary* conveyances ; which are those by means whereof the benefit or estate is created or first arises ; others are *derivative* or *secondary*, whereby the benefit or estate originally created, is enlarged, restrained, transferred, or extinguished.

**Original* conveyances are the following : 1. Feoffment ; [*310 2. Gift ; 3. Grant ; 4. Lease ; 5. Exchange ; 6. Partition : *derivative* are, 7. Release ; 8. Confirmation ; 9. Surrender ; 10. Assignment ; 11. Defeasance.

1. A feoffment, *feoffamentum*, is a substantive derived from the verb, to enfeoff, *feoffare* or *infeudare*, to give one a feud ; and therefore feoffment is properly *donatio feudi*. It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may properly be defined, the gift of any corporeal hereditament to another. He that so gives, or enfeoffs, is called the *feoffor* ; and the person enfeoffed is denominated the *feoffee*.

This is plainly derived from, or is indeed itself the very mode of, the ancient feudal donation ; for though it may be performed by the word "*enfeoff*" or "grant," yet the aptest word of feoffment is, "*do or dedi*." And it is still directed and governed by the same feudal rules ; insomuch that the principal rule relating to the extent and effect of the feudal grant, "*tenor est qui legem dat feudo*," is in other words become the maxim of our law with relation to feoffments, "*modus legem dat donationi*." And therefore, as in pure feudal donations, the lord, from whom the feud moved, must expressly limit and declare the continuance or quantity of estate which he meant to confer, "*ne quis plus donasse præsumatur quam in donatione expresserit* ;" so, if one grants by feoffment lands or tenements to another, and limits or expresses no estate, the grantee (due ceremonies of law being performed) hath barely an estate for life. For as the personal abilities of the feoffee were originally presumed to be the immediate or principal inducements to the feoffment, the feoffee's estate ought to be confined to his person, and subsist only for his life ; unless the feoffor, by express provision in the creation *311] *and constitution of the estate, hath given it a longer continuance. These express provisions are indeed generally made ; for this was for ages the only conveyance, whereby our ancestors were wont to create an estate in fee-simple, by giving the land to the feoffee, to hold to him and his heirs for ever ; though it serves equally well to convey any other estate of freehold.

But by the mere words of the deed the feoffment is by no means perfected ; there remains a very material ceremony to be performed, called *livery of seizin* ; without which the feoffee has but a mere estate at will. This livery of seizin is no other than the pure feudal investiture, or delivery of corporal possession of the land or tenement : which was held absolutely necessary to complete the donation. "*Nam feudum sine investitura nullo modo constitui potuit* ;" and an estate was then only perfect, when, as the author of *Fleta* expresses it in our law, "*fit juris et seisinæ conjunctio*."

Investitures, in their original rise, were probably intended to demonstrate in conquered countries the actual possession of the lord ; and that he did not grant a bare litigious right, which the soldier was ill qualified to prosecute, but a peaceable and firm possession. And at a time when writing was seldom practiced, a

mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of by-standers, who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate; and that such, as claimed title by other means, might know against whom to bring their actions.

In all well-governed nations some notoriety of this kind has been ever held requisite, in order to acquire and ascertain *the property of lands. In the Roman law *plenum* [*312 *dominium* was not said to subsist, unless where a man had both the *right* and the *corporal possession*; which possession could not be acquired without both an actual intention to possess, and an actual seizin, or entry into the premises, or part of them in the name of the whole. And even in ecclesiastical promotions, where the freehold passes to the person promoted, corporal possession is required at this day, to vest the property completely in the new proprietor; who, according to the distinction of the canonists, acquires the *jus ad rem*, or inchoate and imperfect right, by nomination and institution; but not the *jus in re*, or complete and full right, unless by corporal possession. Therefore in dignities possession is given by instalment; in rectories and vicarages by induction, without which no temporal rights accrue to the minister, though every ecclesiastical power is vested in him by institution. So also even in descents of lands by our law, which are cast on the heir by act of the law itself, the heir has not *plenum dominium*, or full and complete ownership, till he has made an actual corporal entry into the lands: for if he dies before *entry* made, *his* heir shall not be entitled to take the possession, but the heir of the person who was last actually seized. It is not therefore only a mere right to enter, but the actual entry that makes a man complete owner so as to transmit the inheritance to his own heirs: *non jus, sed seisinam, facit stipitem*.

Yet the corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases anciently allowed; by transferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was *permitted as [*313

equivalent to occupancy of the land itself. Among the Jews we find the evidence of a purchase thus defined in the book of Ruth : " Now this was the manner in former time in Israel, concerning redeeming and concerning changing, for to confirm all things : a man plucked off his shoe and gave it to his neighbor : and this was a testimony in Israel." Among the ancient Goths and Swedes, contracts for the sale of lands were made in the presence of witnesses who extended the cloak of the buyer, while the seller cast a clod of the land into it, in order to give possession ; and a staff or wand was also delivered from the vendor to the vendee, which passed through the hands of the witnesses. With our Saxon ancestors the delivery of a turf was a necessary solemnity to establish the conveyance of lands. And to this day, the conveyance of our copyhold estates is usually made from the seller to the lord or his steward by delivery of a rod or verge, and then from the lord to the purchaser by redelivery of the same, in the presence of a jury of tenants.

Conveyances in writing were the last and most refined improvement. The mere delivery of possession, either actual or symbolical, depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten or misrepresented, and became frequently incapable of proof. Besides, the new occasions and necessities introduced by the advancement of commerce, required means to be devised of charging and encumbering estates, and of making them liable to a multitude of conditions and minute designations for the purposes of raising money, without an absolute sale of the land ; and sometimes the like proceedings were found useful in order to make a decent and competent provision for the numerous branches of a family, and for other domestic views. None of which could be effected by a mere, simple, corporal transfer of the soil, from one man to another, which was principally calculated for conveying an absolute, unlimited dominion. * Written deeds were therefore introduced, in order to specify and perpetuate the peculiar purposes of the party who conveyed ; yet still, for a very long series of years, they were never made use of, but in company with the more ancient and notorious method of transfer, by delivery of corporal possession.

Livery of seizin, by the common law, is necessary to be made upon every grant of an estate of freehold in hereditaments cor-

poreal, whether of inheritance or for life only. In hereditaments incorporeal it is impossible to be made; for they are not the object of the senses; and in leases for years, or other chattel interests, it is not necessary. In leases for years indeed an actual entry is necessary, to vest the estate in the lessee: for the bare lease gives him only a right to enter, which is called his interest in the term, or *interesse termini*: and when he enters in pursuance of that right, he is then, and not before, in possession of his term, and complete tenant for years. This entry by the tenant himself serves the purpose of notoriety, as well as livery of seizin from the grantor could have done; which it would have been improper to have given in this case, because that solemnity is appropriated to the conveyance of a freehold. And this is one reason why freeholds cannot be made to commence *in futuro*, because they cannot (at the common law) be made but by livery of seizin; which livery, being an actual manual tradition of the land, must take effect *in præsentî*, or not at all.

On the creation of a *freehold* remainder, at one and the same time with a particular estate for years, we have before seen, that at the common law, livery must be made to the particular tenant. But if such a remainder be created afterwards, expectant on a lease for years now in being, the livery must not be made to the lessee for years, for then it operates nothing; "*nam quod semel meum est, amplius meum esse non potest*;" but it must be made to the remainderman *himself, by consent of [*315 the lessee for years; for without his consent no livery of the possession can be given; partly because such forcible livery would be an ejectment of the tenant from his term, and partly for the reasons before given for introducing the doctrine of attornments.

Livery of seizin is either in *deed*, or in *law*. Livery in *deed* is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney (for this may as effectually be done by deputy or attorney, as by the principals themselves in person), come to the land, or to the house; and there in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect: "I deliver these to you in the

name of seizin of all the lands and tenements contained in this deed." But if it be of a house, the feoffor must take the ring or latch of the door, the house being quite empty and deliver it to the feoffee in the same form ; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others. If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seizin of any parcel, in the name of the rest, sufficeth for all, but if they be in several counties, there must be as many liveries as there are counties. For if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Besides anciently this seizin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighborhood, who attested such delivery in the body or on the back of the deed ; according to the rule of the feudal law, *pares debent interesse investituræ feudi, et non alii* : *316] for which this reason is expressly given : because *the peers or vassals of the lord, being bound by their oath of fealty, will take care that no fraud be committed to his prejudice, which strangers might be apt to connive at. And though afterwards the ocular attestation of the *pares* was held unnecessary, and livery might be made before any credible witnesses, yet the trial in case it was disputed (like that of all other attestations) was still reserved to the *pares* or jury of the county. Also, if the lands be out on lease, though all lie in the same county, there must be as many liveries as there are tenants : because no livery^e can be made in this case but by the consent of the particular tenant ; and the consent of one will not bind the rest. And in all these cases it is prudent, and usual to endorse the livery of seizin on the back of the deed, specifying the manner, place, and time of making it ; together with the names of the witnesses. And thus much for livery in deed.

Livery in *law* is where the same is not made *on* the land, but *in sight of it* only ; the feoffor saying to the feoffee, " I give you yonder land, enter and take possession." Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise ; unless he dares not enter, through fear of his life or bodily harm : and then his continual claim, made yearly, in due form of law, as near as possible to the lands, will suffice without

an entry. This livery in law cannot however be given or received by attorney, but only by the parties themselves.¹⁶

2. The conveyance by *gift, donatio*, is properly applied to the creation of an estate-tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment, but in the nature of an estate passing by it: for the operative words of conveyance in this case are *do* or *dedi*; and gifts in tail are equally imperfect without livery of seizin, as feoffments in fee simple. *And this is the only [*317 distinction that Littleton seems to take, when he says, "It is to be understood that there is feoffor and feoffee, donor and donee, lessor and lessee;" viz. feoffor is applied to a feoffment in fee-simple, donor to a gift in tail, and lessor to a lease for life, or for years, or at will. In common acceptance gifts are frequently confounded with the next species of deeds: which are,—

3. Grants, *concessionēs*; the regular method by the common law of transferring the property of *incorporeal* hereditaments, or such things whereof no livery can be had. For which reason all corporeal hereditaments, as lands and houses, are said to lie *in livery*; and the others, as advowsons, commons, rents, reversions, &c. to lie *in grant*. And the reason is given by Bracton: "*traditio, or livery, nihil aliud est quam rei corporalis de persona in personam, de manu in manum, translatio aut in possessionem inductio: sed res incorporales, quæ sunt ipsum jus rei vel corpori inhaerens, traditionem non patiuntur.*" These therefore pass merely by the delivery of the deed. And in signiories, or reversions of lands, such grant, together with the attornment of the tenant (while attornments were requisite), were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate possession. It therefore differs but little from a feoffment, except in its subject-matter: for the operative words therein commonly used are *dedi et concessi*, "have given and granted."

4. A lease is properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense), made for life, for years, or at will but always for a *less* time than

¹⁶ Conveyance by feoffment and livery of seizin, has been superseded in England by other modes of conveyance. In the United States, it was employed in some few instances at an early period, but has long since been abolished, or fallen into disuse.

the lessor hath in the premises ; for if it be for the *whole* interest, it is more properly an assignment than a lease. The usual words of operation in it are, "demise, grant, and to farm let; *318] *dimisi, concessi, et ad firmam *tradidi.*" *Farm* or *feorme*, is an old Saxon word signifying provision, and it came to be used instead of rent or render, because anciently the greater part of rents were reserved in provisions ; in corn, in poultry, and the like : till the use of money became more frequent. So that a farmer, *firmarius*, was one who held his lands upon payment of a rent or *feorme* : though at present, by a gradual departure from the original sense, the word *farm* is brought to signify the very estate or lands so held upon farm or rent. By this conveyance in estate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments : though livery of seizin is indeed incident and necessary to one species of leases, *viz.* leases for life of corporeal hereditaments ; but to no other.

Whatever restriction, by the severity of the feudal law, might in times of very high antiquity be observed with regard to leases ; yet by the common law, as it has stood for many centuries, all persons seized of any estate might let leases to endure, so long as their own interest lasted, but no longer. Therefore tenant in fee-simple might let leases of any duration, for he hath the whole interest ; but tenant in tail, or tenant for life, could make no leases which should bind the issue in tail or reversioner : † nor could a husband, seized *jure uxoris*, make a firm or valid lease for any longer term than the joint lives of himself and his wife, for then his interest expired. Yet some tenants for life, where the fee-simple was in abeyance, might (with the concurrence of such as have the guardianship of the fee) make leases of equal duration with those granted by tenants in fee-simple, such as parsons and vicars with consent of the patron and ordinary. So also bishops, and deans, and such other sole ecclesiastical corporations as are seized of the fee-simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made leases for years, or for life, estates in tail, or in fee, without any limitation or control *319] And corporations aggregate *might have made what estates they pleased, without the confirmation of any other person whatsoever. Whereas now, by several statutes, this power, where it was unreasonable, and might be made an ill use of, is

† See *ante*, p. 307, note 2.

restrained ; and, where in the other cases the restraint by the common-law seemed too hard, it is in some measure removed. The former statutes are called the *restraining*, the latter the *enabling* statute. We will take a view of them all, in order of time.

And, first, the *enabling* statute, 32 Hen. VIII., ch. 28, empowers three manner of persons to make leases, to endure for three lives or one-and-twenty years ; which could not do so before. As first, tenant in tail may by such leases bind his issue in tail, but not those in remainder or reversion. Secondly, a husband seized in right of his wife, in fee-simple or fee-tail, provided the wife joins in such lease, may bind her and her heirs thereby. Lastly, all persons seized of an estate of fee-simple in right of their churches, which extends not to parsons and vicars, may (without the concurrence of any other person) bind their successors. But then there must many requisites be observed, which the statute specifies, otherwise such leases are not binding. 1. The lease must be by indenture ; and not by deed poll, or by parol. 2. It must begin from the making, or day of the making, and not at any greater distance of time. 3. If there be any old lease in being, it must be first absolutely surrendered, or be within a year of expiring. 4. It must be *either* for twenty-one years *or* three lives, and not for both. 5. It must not exceed the term of three lives, or twenty-one years, but may be for a shorter term. 6. It must be of corporeal hereditaments, and not of such things as lie merely in grant : for no rent can be reserved thereout by the common law, as the lessor cannot resort to them to distrain. 7. It must be of *lands and tenements most commonly [*320 letten for twenty years past ; so that if they had been let for above half the time (or eleven years out of the twenty) either for life, or for years at will, or by copy of court roll, it is sufficient. 8. The most usual and customary feorm or rent, for twenty years past, must be reserved yearly on such lease. 9. Such leases must not be made without impeachment of waste. These are the guards, imposed by the statute (which was avowedly made for the security of farmers and the consequent improvement of tillage) to prevent unreasonable abuses, in prejudice of the issue, the wife, or the successor, of the reasonable indulgence here given.¹⁶

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¹⁶ There is omitted at this point those portions of the original text con-

5. An *exchange* is a mutual grant of equal interests, the one in consideration of the other. The word "exchange," is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word, or expressed by any circumlocution. The estates exchanged must be equal in quantity; not of *value*, for that is immaterial, but of *interest*: as fee-simple for fee-simple, a lease for twenty years for a lease for twenty years, and the like. And the exchange may be of things that lie either in grant or in livery. But no livery of seizin, even in exchanges of freehold, is necessary to perfect the conveyance: for each party stands in the place of the other, and occupies his right, and each of them hath already had corporal possession of his own land. But entry must be made on both sides; for, if either party die before entry, the exchange is void, for want of sufficient notoriety. And so also, if two parsons, by consent of patron and ordinary, exchange their preferments; and the one is presented, instituted, and inducted, and the other is presented, and instituted, but dies before induction; the former shall not keep his new benefice, because the exchange was not completed, and therefore he shall return back to his own. For if, after an exchange of lands or other hereditaments, either party be evicted of those which were taken by him in exchange, through defect of the other's title; he shall return back to the possession of his own, by virtue of the implied warranty contained in all exchanges.

6. A partition is when two or more joint-tenants, coparceners, *324] or tenants in common, agree to divide the *lands so held among them in severalty, each taking a distinct part. Here, as in some instances there is a unity of interest and in all a unity of possession, it is necessary that they all mutually convey and assure to each other the several estates which they are to take and enjoy separately. By the common law, coparceners, being compellable to make partition, might have made it by parol only; but joint-tenants and tenants in common must have done it by taining a statement of the provisions of the *disabling or restraining* statutes, to which reference is made. These are of little importance to the American student, and they have, to a large extent, been modified by subsequent English legislation. They were passed to prevent bishops, deans and chapters, colleges, and other ecclesiastical or eleemosynary corporations, and all parsons and vicars, from making improvident leases. (See for the present English law, Broom & Hadley's Comm. ii. 509.)

deed : and in both cases the conveyance must have been perfected by livery of seizin. And the statutes of 31 Hen. VIII., ch. 1, and 32 Hen. VIII., ch. 32, made no alteration in this point. But the statute of frauds, 29 Car. II., ch. 3, hath now abolished this distinction, and made a deed in all cases necessary.¹⁷

These are the several species of *primary* or *original* conveyances. Those which remain are of the *secondary* or *derivative* sort ; which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore or transfer the interest granted by such original conveyance. As,—

7. Releases ; which are a discharge or a conveyance of a man's right in lands or tenements, to another that hath some former estate in possession. The words generally used therein are "remised, released, and for ever quit-claimed." And these releases may enure either, 1. By way of *enlarging an estate*, or *enlarger l' estate* : as if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee. But in this case the releesee must be in *possession* of some estate, for the release to work upon ; for if there be lessee for years, and before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void for want of possession in the releesee. 2. By way of *passing an estate*, or *mitter l' estate* : as when one of two coparceners releaseth all her *right to the other, this passeth the fee-simple of [*325 the whole. And in both these cases there must be a privity of estate between the releasor and releesee ; that is, one of their estates must be so related to the other, as to make but one and the same estate in law. 3. By way of *passing a right*, or *mitter le droit* : as if a man be disseized, and releaseth to his disseizor all his right, hereby the disseizor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful. 4. By way of *extinguishment* : as if my tenant for life makes a lease to A for life, remainder to B and his heirs, and I release to A ; this extinguishes my right to the reversion, and shall enure to the advantage of B's remainder as well as of A's particular estate. 5. By way of *entry and feoffment* :

¹⁷ In the United States, statutes will be found in the several States, providing methods for the partition of estates held in joint tenancy and tenancy in common.

as if there be two joint disseizors, and the disseizee releases to one of them, he shall be sole seized, and shall keep out his former companion ; which is the same in effect as if the disseizee had entered, and thereby put an end to the disseizin, and afterwards had enfeoffed one of the disseizors in fee. And hereupon we may observe, that when a man has in himself the possession of lands, he must at the common law convey the freehold by feoffment and livery ; which makes a notoriety in the country : but if a man has only a right or a future interest, he may convey that right or interest by a mere release to him that is in possession of the land : for the occupancy of the relesee is a matter of sufficient notoriety already.

8. A confirmation is of a nature nearly allied to a release. Sir Edward Coke defines it to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased ; and the words of making it are these, “ have given, granted, ratified, approved, and confirmed.” An instance of the first branch of the definition is, if tenant for life leaseth for forty years, and dieth during that term ; here the lease for years is voidable by him in *326] reversion ; yet, if he *hath confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable but sure. The latter branch, or that which tends to the increase of a particular estate, is the same in all respects with that species of release, which operates by way of enlargement.

9. A surrender, *sursumredditio*, or rendering up, is of a nature directly opposite to a release ; for, as that operates by the greater estate’s descending upon the less, a surrender is the falling of a less estate into a greater. It is defined, a yielding up of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement between them. It is done by these words, “ hath surrendered, granted, and yielded up.” The surrenderor must be in possession ; and the surrenderee must have a higher estate, in which the estate surrendered may merge ; therefore tenant for life cannot surrender to him in remainder for years. In a surrender there is no occasion for livery of seizin ; for there is a privity of estate between the surrenderor and the surrenderee ; the one’s particular estate and the other’s remainder are one and the same estate ; and livery having been

once made at the creation of it, there is no necessity for having it afterwards. And for the same reason, no livery is required on a release or confirmation in fee to tenant for years or at will, though a freehold thereby passes; since the reversion of the lessor, or confirmor, and the particular estate of the releesee, or confirmee are one and the same estate; and where there is already a possession, derived from such a privity of estate, any further delivery of possession would be vain and nugatory.

10. An *assignment* is properly a transfer, or making over to another, of the right one has in *any* estate; but it is usually applied to an estate for life or years. And it differs from a lease only in this: that by a lease one grants an interest less *than his own, reserving to himself a reversion; in assign- [*327 ments he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor.¹⁸

11. A defeasance is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be *defeated* or totally undone. And in this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeasance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by the ancient law; and therefore only, indulged: no subsequent secret revocation of a solemn conveyance, executed by livery of seizin, being allowed in those days of simplicity and truth: though, when uses were afterwards introduced, a revocation of such uses was permitted by the courts

¹⁸ [This is not universally true; for there is a variety of distinctions when the assignee is bound by the covenants of the assignor, and when he is not. The general rule is, that he is bound by all covenants which run with the land; but not by collateral covenants which do not run with the land. Thus, where the lessee covenants for himself, his executors and administrators, to reside upon the premises, this covenant binds the assignee, for it runs with, or is appurtenant to, the thing demised. An assignee is liable for rent only while he continues in possession under the assignment. And he is held not to be guilty of a fraud, if he assigns over to a beggar.] Covenants running with the land, in the law of landlord and tenant, are such as the following: covenants to pay rent; to insure; to repair; to pay taxes; to deliver up the premises in good condition; for quiet enjoyment, &c. (See 44 & 45 Vict. c. 41, s. 10.)

of equity. But things that were merely executory, or to be completed by matter subsequent (as rents, on which no seizin could be had till the time of payment ;) and so also annuities, conditions, warranties, and the like, were always liable to be recalled by defeasances made subsequent to the time of their creation.

II. There yet remain to be spoken of some few conveyances, which have their force and operation by virtue of the *statute of uses*.

Uses and *trusts* are in their original of a nature very similar, or rather exactly the same : answering more to the *fidei-commisum* than the *usus fructus* of the civil law : which latter was the temporary right of using a thing, without having the ultimate property, or full dominion of the substance. But the *fidei-commisum*, which usually was created by will, was the disposal of *328] an inheritance to one, in confidence that he *should convey it or dispose of the profits at the will of another. And it was the business of a particular magistrate, the *prætor fidei commissarius*, instituted by Augustus, to enforce the observance of this confidence. So that the right thereby given was looked upon as a vested right, and entitled to a remedy from a court of justice ; which occasioned that known division of rights by the Roman law into *jus legitimum*, a legal right, which was remedied by the ordinary course of law ; *jus fiduciarum*, a right in trust, for which there was a remedy in conscience ; and *jus precarium*, a right in courtesy, for which the remedy was only by entreaty or request. In our law, a use might be ranked under the rights of the second kind ; being a confidence reposed in another who was tenant of the land, or *terre-tenant*, that he should dispose of the land according to the intentions of *cestui que use*, or him to whose use it was granted, and suffer him to take the profits. As, if a feoffment was made to A and his heirs, to the use of (or in trust for) B and his heirs ; here at the common law, A the *terre-tenant* had the legal property and possession of the land, but B the *cestui que use* was in conscience and equity to have the profits and disposal of it.

This notion was transplanted into England from the civil law, about the close of the reign of Edward III., by means of the foreign ecclesiastics ; who introduced it to evade the statutes of mortmain, by obtaining grants of lands not to religious houses

directly, but to *the use of* the religious houses : which the clerical chancellors of those times held to be *fidei-commissa*, and binding in conscience ; and therefore assumed the jurisdiction which Augustus had vested in his *prætor*, of compelling the execution of such trusts in the court of chancery. And, as it was most easy to obtain such grants from dying persons, a maxim was established, that though by law the lands themselves were not devisable, yet if a testator had enfeoffed another to his own use, and so was *possessed of the use only, such use was devisable [*329 by will. But we have seen how this evasion was crushed in its infancy, by statute 15 Ric. II., ch. 5, with respect to religious houses.

Yet, the idea being once introduced, however fraudulently, it afterwards continued to be often innocently, and sometimes very laudably, applied to a number of civil purposes : particularly as it removed the restraint of alienations by will, and permitted the owner of lands in his lifetime to make various designations of their profits, as prudence, or justice, or family convenience, might from time to time require. Till at length, during our long wars in France, and the subsequent civil commotions between the houses of York and Lancaster, uses grew almost universal ; through the desire that men had (when their lives were continually in hazard) of providing for their children by will, and of securing their estates from forfeitures ; when each of the contending parties, as they became uppermost, alternately attainted the other. Wherefore, about the reign of Edw. IV. (before whose time Lord Bacon remarks, there are not six cases to be found relating to the doctrine of uses), the courts of equity began to reduce them to something of a regular system.

Originally it was held that the chancery could give no relief, but against the very person himself intrusted for *cestui que use*, and not against his heir or alienee. This was altered in the reign of Henry VI., with respect to the heir ; and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration, or with an express notice of the use. But a purchaser for a valuable consideration, without notice, might hold the land discharged of any trust or confidence. And also it was held, that neither the king nor queen, on account of their dignity royal, nor any corporation *ag- [*330 gregate, on account of its limited capacity, could be seized to

any use but their own ; that is, they might hold the lands, but were not compellable to execute the trust. And, if the feoffee to uses died without heir, or committed a forfeiture or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife to whom dower was assigned, were liable to perform the use ; because they were not parties to the trust, but came in by act of law ; though doubtless their title in reason was no better than that of the heir.

On the other hand the use itself, or interest of *cestui que use*, was learnedly refined upon with many elaborate distinctions. And, 1. It was held that nothing could be granted to a use, whereof the use is inseparable from the possession ; as annuities, ways, commons, and authorities, *quæ ipso usu consumuntur* : or whereof the seizin could not be instantly given. 2. A use could not be raised without a sufficient consideration. For where a man makes a feoffment to another, without any consideration, equity presumes that he meant it to the use of himself, unless he expressly declares it to be the use of another, and then nothing shall be presumed contrary to his own expressions. But if either a good or a valuable consideration appears, equity will immediately raise a use, correspondent to such consideration. 3. Uses were descendible according to the rules of common law, in case of inheritances in possession ; for in this and many other respects *æquitas sequitur legem*, and cannot establish a different rule of property from that which the law has established. 4. Uses might be assigned by secret deeds between the parties, or be devised by last will and testament ; for, as the legal estate to the soil was not transferred by these transactions, no livery of *331] seizin was necessary ; *and, as the intention of the parties was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in equity. But *cestui que use* could not at common law aliene the legal interest of the lands, without the concurrence of his feoffee ; to whom he was accounted by law to be only tenant at sufferance. 5. Uses were not liable to any of the feudal burdens ; and particularly did not escheat for felony or other defect of blood ; for escheats etc., are the consequence of *tenure*, and uses are held of nobody : but the land itself was liable to escheat, whenever the blood of the feoffee to uses was extinguished by crime or by de

fect ; and the lord (as was before observed) might hold it discharged of the use. 6. No wife could be endowed, or husband have his curtesy, of a use : for no trust was declared for their benefit, at the original grant of the estate. And therefore it became customary, when most estates were put in use, to settle before marriage some joint-estate to the use of the husband and wife for their lives ; which was the original of modern jointures. 7. A use could not be extended by writ of *elegit*, or other legal process, for the debts of *cestui que use*. For, being merely a creature of equity, the common law, which looked no farther than to the person actually seized of the land, could award no process against it.

It is impracticable, upon our present plan, to pursue the doctrine of uses through all the refinements and niceties which the ingenuity of the times (abounding in subtile disquisitions) deduced from this child of the imagination ; when once a departure was permitted from the plain simple rules of property established by the ancient law. These principal outlines will be fully sufficient to show the ground of Lord Bacon's complaint, that this course of proceeding " was turned to deceive many of their just and reasonable rights. A man, that had cause to sue for land, knew not against whom to *bring his action, or who was *[332 the owner of it. The wife was defrauded of her thirds ; the husband of his curtesy ; the lord of his wardship, relief, heriot, and escheat ; the creditor of his extent for debt ; and the poor tenant of his lease." To remedy these inconveniences abundance of statutes were provided, which made the lands liable to be extended by the creditors of *cestui que use*, allowed actions for the freehold to be brought against him if in the actual pernancy or enjoyment of the profits ; made him liable to actions of waste ; established his conveyances and leases made without the concurrence of his feoffees ; and gave the lord the wardship of his heir, with certain other feudal perquisites.

These provisions all tended to consider *cestui que use* as the real owner of the estate ; and at length the idea was carried into effect by the statute 27 Hen. VIII., ch. 10, which is usually called the *statute of uses*, or, in conveyances and pleadings, the *statute for transferring uses into possession*. The hint seems to have been derived from what was done at the accession of King Richard III. ; who, having, when Duke of Gloucester, been frequently

made a feoffee to uses, would upon the assumption of the crown (as the law was then understood) have been entitled to hold the lands discharged of the use. But to obviate so notorious an injustice, an act of parliament was immediately passed, which ordained, that where he had been so enfeoffed jointly with other persons, the land should vest in the other feoffees, as if he had never been named; and that, where he stood solely enfeoffed, the estate itself should vest in *cestui que use* in like manner as he had the use. And so the statute of Henry VIII., after reciting the various inconveniences before-mentioned, and many others, enacts, that "when any person shall be *seized* of lands, &c., to the use, confidence, or trust of any other person or body *333] *politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seized or possessed of the land, etc., of and in the like estates as they have in the use, trust, or confidence; and that the estate of the person so seized to uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition, as they had before in the use." The statute thus *executes* the use, as our lawyers term it; that is, it conveys the possession to the use, and transfers the use into possession; thereby making *cestui que use* complete owner of the lands and tenements, as well at law as in equity.

The statute having thus not abolished the conveyance to uses, but only annihilated the intervening estate of the feoffee, and turned the interest of *cestui que use* into a legal instead of an equitable ownership; the courts of common law began to take cognizance of uses, instead of sending the party to seek his relief in chancery. And, considering them now as merely a mode of conveyance, very many of the rules before established in equity were adopted with improvements by the judges of the common law. The same persons only were held capable of being seized to a use, the same considerations were necessary for raising it, and it only could be raised of the same hereditaments as formerly. But as the statute, the instant it was raised, converted it into an actual possession of the land, a great number of the incidents, that formerly attended it in its fiduciary state, were now at an end. The land could not escheat or be forfeited by the act or defect of the feoffee, nor be aliened to any purchaser discharged of the use, nor be liable to dower or curtesy on account

of the seizin of such feoffee ; because the legal estate never rests in him for a moment, but is instantaneously transferred to *cestui que use* as soon as the use is declared. And, as the use and the land were now convertible terms, they became liable to dower, curtesy, and escheat, in consequence of the seizin of *cestui que use*, who was now become the *terre-tenant* also ; and they likewise were no longer devisable by will.

* The various necessities of mankind induced also the [*334 judges very soon to depart from the rigor and simplicity of the rules of the common law, and to allow a more minute and complex construction upon conveyances to uses than upon others. Hence it was adjudged that the use need not always be executed the instant the conveyance is made : but, if it cannot take effect at that time, the operation of the statute may wait till the use shall arise upon some future contingency ; to happen within a reasonable period of time ; and in the meanwhile the ancient use shall remain in the original grantor ; as when lands are conveyed to the use of A. and B., after a marriage shall be had between them, or to the use of A. and his heirs till B. shall pay him a sum of money, and then to the use of B. and his heirs. Which doctrine, when devises by will were again introduced, and considered as equivalent in point of construction to declarations of uses, was also adopted in favor of *executory devises*. But herein these, which are called *contingent* or *springing* uses, differ from an executory devise ; in that there must be a person seized to such uses at the time when the contingency happens, else they can never be executed by the statute ; and therefore if the estate of the feoffee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed for ever : whereas by an executory devise the freehold itself is transferred to the future devisee. And, in both these cases, a fee may be limited to take effect after a fee ; because, though that was forbidden by the common law in favor of the lord's escheat, yet when the legal estate was not extended beyond one fee-simple, such subsequent uses (after a use in fee) were before the statute permitted to be limited in equity ; and then the statute executed the legal estate in the same manner as the use before subsisted. It was also held, that a use, though executed, may change from one to another by circumstances *ex post facto* ; as, if A makes a feoffment *to the use of his intended wife and her eldest son for [*335

their lives, upon the marriage the wife takes the whole use in severalty ; and upon the birth of a son, the use is executed jointly in them both. This is sometimes called a *secondary*, sometimes a *shifting* use. And, whenever the use limited by the deed expires, or cannot vest, it returns back to him who raised it, after such expiration, or during such impossibility, and is styled a *resulting* use. As, if a man makes a feoffment to the use of his intended wife for life, with remainder to the use of her first-born son in tail ; here, till he marries, the use results back to himself ; after marriage, it is executed in the wife for life : and, if she dies without issue, the whole results back to him in fee. It was likewise held, that the uses originally declared may be revoked at any future time, and new uses be declared of the land, provided the grantor reserved to himself such a power at the creation of the estate ; whereas the utmost that the common law would allow, was a deed of defeasance coeval with the grant itself, and therefore esteemed a part of it, upon events specially mentioned. And, in case of such revocation, the old uses were held instantly to cease, and the new ones to become executed in their stead. And this was permitted, partly to indulge the convenience, and partly the caprice of mankind ; who (as Lord Bacon observes) have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards.

By this equitable train of decisions in the courts of law, the power of the court of chancery over landed property was greatly curtailed and diminished. But one or two technical scruples which the judges found it hard to get over, restored it with tenfold increase. They held, in the first place, that "no use could be limited on a use ;" and that when a man bargains and sells his land for money, which raises a use by implication to the bargainee, the limitation of a farther use to another person is repugnant, *336] and therefore *void. And therefore on a feoffment to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity : not adverting, that the instant the first use was executed in B., he became seized to the use of C., which second use the statute might as well be permitted to execute as it did the first ; and so the legal estate might be instantaneously transmitted down through a hundred uses upon uses, till finally executed in the last *cestui que use*. Again ; as

the statute mentions only such persons as were *seized* to the use of others, this was held not to extend to terms of years, or other chattel interests, whereof the termor is not *seized*, but only *possessed*; and therefore, if a term of one thousand years be limited to A., to the use of (or in trust for) B., the statute does not execute this use, but leaves it as at common law. And lastly (by more modern resolutions), where lands are given to one and his heirs, in trust to receive and pay over the profits to another, this use is not executed by the statute; for the land must remain in the trustee to enable him to perform the trust.

Of the two more ancient distinctions the courts of equity quickly availed themselves. In the first case it was evident, that B. was never intended by the parties to have any beneficial interest; and, in the second, the *cestui que use* of the term was expressly driven into the court of chancery to seek his remedy: and therefore that court determined, that though these were not *uses* which the statute could execute, yet still they were *trusts* in equity, which in conscience ought to be performed. To this the reason of mankind assented, and the doctrine of uses was revived, under the denomination of *trusts*; and thus, by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of a conveyance.

*However, the courts of equity, in the exercise of this [*337 new jurisdiction, have wisely avoided in a great degree those mischiefs which made uses intolerable. The statute of frauds, 29 Car. II., ch. 3, having required that every declaration, assignment, or grant of any trust in lands or hereditaments (except such as arise from implication or construction of law), shall be made in writing signed by the party, or by his written will: the courts now consider a trust-estate (either when expressly declared or resulting by such implication) as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, which the other is subject to in law: and by a long series of uniform determinations, for now near a century past, with some assistance from the legislature, they have raised a new system of rational jurisprudence, by which trusts are made to answer in general all the beneficial ends of uses, without their inconvenience or frauds. The trustee is considered as merely

the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consideration to a purchaser without notice; which, as *cestui que use* is generally in possession of the land, is a thing that can rarely happen. The trust will descend, may be aliened, is liable to debts, to executions on judgments, statutes, and recognizances (by the express provision of the statute of frauds), to forfeiture, to leases, and other incumbrances, nay, even to the curtesy of the husband, as if it was an estate at law. It has not yet indeed been subjected to dower, more from a cautious adherence to some hasty precedents, than from any well-grounded principle.¹⁹ It hath also been held not liable to escheat to the lord, in consequence of attainder or want of heirs; because the trust could never be intended for his benefit. But let us now return to the statute of uses.

The only service, as was before observed, to which this statute is now consigned, is in giving efficacy to certain new and secret species of conveyances; introduced in order to render transactions of this sort as private as possible, and to save the trouble of making livery of seizin, the only ancient conveyance of corporal freeholds; the security and notoriety of which public investiture abundantly overpaid the labor of going to the land, or of sending an attorney in one's stead. But this now has given way to—

***338]** *12. A twelfth species of conveyance, called a *covenant to stand seized to uses*: by which a man, seized of lands, covenants in consideration of blood or marriage that he will stand seized of the same to the use of his child, wife, or kinsman; for life, in tail, or in fee. Here the statute executes at once the estate; for the party intended to be benefited, having thus acquired the use, is thereby put at once into corporal possession of the land, without ever seeing it, by a kind of parliamentary magic. But this conveyance can only operate, when made upon such weighty and interesting considerations, as those of blood or marriage.

13. A thirteenth species of conveyance, introduced by this statute, is that of a *bargain and sale* of lands; which is a kind of

¹⁹ But it is now provided by statute (3 & 4 Will. IV.) that widows of *cestuis que trust*, shall have dower in trust estates. The same doctrine prevails generally in the United States. (See *ante*, p. 315, note 10.) The system of trust estates was derived in this country from English jurisprudence, and is of great importance. The law of trusts is fully considered in Mr. Washburn's treatise upon Real Property, vol. ii., pp. 485-580, 5th ed.)

real contract, whereby the bargainor for some pecuniary consideration bargains and sells, that is, contracts to convey, the land to the bargainee ; and becomes by such a bargain a trustee for, or seized to the use of, the bargainee : and then the statute of uses completes the purchase ; or, as it hath been well expressed, the bargain first vests the use, and then the statute vests the possession. But as it was foreseen that conveyances, thus made, would want all those benefits of notoriety, which the old common law assurances were calculated to give ; to prevent therefore clandestine conveyances of freeholds, it was enacted in the same session of parliament by statute 27 Hen. VIII., ch. 16, that such bargains and sales should not enure to pass a freehold, unless the same be made by indenture, and *enrolled* within six months in one of the courts of Westminster-hall, or with the *custos rotulorum* of the county. Clandestine bargains and sales of chattel interests, or leases for years, were thought not worth regarding, as such interests were very precarious, till about six years before ; which also occasioned them to be overlooked in framing the statute of uses : and therefore such bargains and sales are not directed to be enrolled. But how impossible is it to *foresee, and provide against, all the consequences of [*339 innovations ! This omission has given rise to

14. A fourteenth species of conveyance, *viz.*, by *lease and release* ; first invented by Serjeant Moore, soon after the statute of uses, and now the most common of any, and therefore not to be shaken ; though very great lawyers (as, particularly, Mr. Noy, attorney-general to Charles I.) have formerly doubted its validity. It is thus contrived. A lease, or rather bargain and sale, upon some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee. Now, this, without any enrollment, makes the bargainor stand seized to the use of the bargainee, and vests in the bargainee the *use* of the term for a year ; and then the statute immediately annexes the *possession*. He, therefore, being thus in possession, is capable of receiving a release of the freehold and reversion ; which, we have seen before, must be made to a tenant in possession : and, accordingly, the next day, a release is granted to him. This is held to supply the place of livery of seizin : and so a conveyance by lease and release is said to amount to a feoffment.²⁰

²⁰ This continued to be the most common mode of conveyance until 1845

15. To these may be added deeds of *revocation of uses*, hinted at in a former page, and founded in a previous power, reserved at the raising of the uses, to revoke such as were then declared; and to appoint others in their stead, which is incident to the power of revocation. And this may suffice for a specimen of conveyances founded upon the statute of uses: and will finish our observations upon such deeds as serve to *transfer* real property.²¹

*340] * Before we conclude, it will not be improper to subjoin a few remarks upon such deeds as are used not to *convey*, but to *charge* or *incumber* lands, and to *discharge* them again: of which nature are, *obligations* or bonds, *recognizances*, and *defeasances* upon them both.

1. An *obligation* or bond, is a deed whereby the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed. If this be all, the bond is called a single one, *simplex obligatio*: but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force: as payment of rent; performance of covenants in a deed; or repayment of a principal sum of money borrowed of the

But by statute passed in that year, it was provided that freehold estates in possession, as well as in reversion, might be conveyed by "grant;" and this is now the regular method of transferring title to such estates, the title passing by the delivery of the deed. (Stat. 8 & 9 Vict., c. 106.) But the use of the word "grant" is not necessary. (44 & 45 Vict., c. 41, s. 49.)

²¹ Most of the various modes of conveyance of estates in land, which are enumerated by Blackstone, have been, at different periods, in more or less general use in the United States. But feoffment was abolished, or fell into disuse, at an early date, and the most commonly employed conveyances in transferring a present title or estate in possession, have been those derived from the Statute of Uses; while "grants" have been applied, as at common law, to the conveyance of incorporeal hereditaments, or estates in reversion and remainder. The terms "lease," "partition," "release," "surrender," "assignment," etc., as denoting modes of conveyance, have much the same extent of meaning in this country as in England. One of the most common forms of deed in use throughout the country, has been that of "bargain and sale." In a number of the States, the form and effect of this and other conveyances have been variously modified by statute. In some of the States, moreover, particular forms of deeds have been prescribed by statute; though this has not generally been done in exclusion of the common law forms, which may therefore also be used, and be enforceable. As an example of such statutory changes, the act of New York may be referred to, which provides that deeds of bargain and sale, and of lease and release, may continue to be used, but shall be deemed grants. (1. R. S., 739, § 142.)

obligee, with interest, which principal sum is usually one-half of the penal sum specified in the bond. In case this condition is not performed, the bond becomes forfeited, or absolute at law, and charges the obligor, while living ; and after his death the obligation descends upon his heir, who (on defect of personal assets) is bound to discharge it, provided he has real assets by descent as a recompense. So that it may be called, though not a *direct*, yet a *collateral*, charge upon the lands. How it affects the personal property of the obligor will be more properly considered hereafter.

If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive, or be uncertain, or insensible, the condition alone is void, and the bond shall stand single, and unconditional ; for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se*, the obligation itself is void : for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards *becomes impossible by the [*341 act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved ; for no prudence or foresight of the obligor could guard against such a contingency.²² On the forfeiture of a bond, or its becoming single, the whole penalty was formerly recoverable at law : but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought ; *viz.* his principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed ; the damages sustained, upon non-performance of covenants and the like. And the like practice having gained some footing in the courts of law, the statute 4 and 5 Ann., ch. 16, at length enacted, in the same spirit of equity, that, in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge.

2. A *recognizance* is an obligation of record, which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act ; as to ap

²² See *People v. Bartlett*, 3 Hill, 570 ; *People v. Manning*, 8 Cow. 297.

pear at the assizes, to keep the peace, to pay a debt, or the like. It is in most respects like another bond: the difference being chiefly this: that the bond is the creation of a fresh debt or obligation *de novo*, the recognizance is an acknowledgment of a former debt upon record; the form whereof is, "that A. B. doth acknowledge to owe to our lord the king, to the plaintiff, to C. D. or the like, the sum of ten pounds," which condition to be void on performance of the thing stipulated: in which case the king, the plaintiff, C. D., etc., is called the cognizee, "*is cui cognoscitur*;" as he that enters into the recognizance is called the cognizor, "*is qui cognoscit*." This, being either certified to or taken by the officer of some court, is witnessed only by the record of that court, and not by the party's seal: so that it is not in strict propriety a deed, though the effects of it are greater *342] than a *common obligation, being allowed a priority in point of payment, and binding the lands of the cognizor, from the time of enrollment on record. There are also other recognizances, of a private kind, *in nature of a statute staple*, by virtue of the statute 23 Hen. VIII., ch. 6, which have been already explained, and shown to be a charge upon real property.

3. A defeasance, on a bond, or recognizance, or judgment recovered, is a condition which, when performed, defeats or undoes it, in the same manner as a defeasance of an estate before mentioned. It differs only from the common condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently a subsequent deed. This, like the condition of a bond, when performed, discharges and disincumbers the estate of the obligor.

These are the principal species of deeds or matter *in pais*, by which estates may be either conveyed, or at least affected. Among which the conveyances to uses are by much the most frequent of any: though in these there is certainly one palpable defect, the want of sufficient notoriety; so that purchasers or creditors cannot know, with any absolute certainty, what the estate, and the title to it, in reality are, upon which they are to lay out or to lend their money. In the ancient feudal method of conveyance (by giving corporal seizin of the lands), this notoriety was in some measure answered; but all the advantages resulting from thence are now totally defeated by the introduc-

tion of death-bed devises and secret conveyances : and there has never been yet any sufficient guard provided against fraudulent charges and incumbrances ; since the disuse of the old Saxon custom of transacting all conveyances at the county court, and entering a memorial of them in the chartulary or leger-book of some adjacent monastery ; and the failure of the general register established by King Richard the First, for the stars or mortgages made to *Jews, in the *capitula de Judæis*, of which [*343 Hoveden has preserved a copy. How far the establishment of a like general register, for deeds, and wills, and other acts affecting real property, would remedy this inconvenience, deserves to be well considered. In Scotland every act and event, regarding the transmission of property, is regularly entered on record. And some of our own provincial divisions, particularly the extended county of York, and the populous county of Middlesex, have prevailed with the legislature to erect such register in their several districts. But, however plausible these provisions may appear in theory, it hath been doubted by very competent judges, whether more disputes have not arisen in those counties by the inattention and omissions of parties, than prevented by the use of registers.²⁸

²⁸ In regard to the record of deeds in this country, see *ante*, p. 454, note, 12.

CHAPTER XXI.

[BL. COMM.—BOOK II. CH. XXI.]

Of Alienation by Matter of Record.

ASSURANCES by *matter of record* are such as do not entirely depend on the act or consent of the parties themselves : but the sanction of a court of record is called in to substantiate, preserve, and be a perpetual testimony of the transfer of property from one man to another ; or of its establishment, when already transferred. Of this nature are : 1. Private acts of parliament. 2. The king's grants. 3. Fines. 4. Common recoveries.

I. *Private acts of parliament* are, especially of late years, become a very common mode of assurance. For it may some

times happen, that by the ingenuity of some, and the blunders of other practitioners, an estate is most grievously entangled by a multitude of contingent remainders, resulting trusts, springing uses, executory devises, and the like artificial contrivances (a confusion unknown to the simple conveyances of the common law); so that it is out of the power of either the courts of law or equity to relieve the owner. Or it may sometimes happen, that by the strictness or omissions of family-settlements, the tenant of the estate is abridged of some reasonable power (as letting leases, making a jointure for a wife, or the like), which power cannot be given him by the ordinary judges either in common law or equity. Or it may be necessary, in settling an estate, to secure it against the claims of infants or other persons under legal disabilities; who are not bound by any judgments or decrees of the ordinary courts of justice. In these or other *345] cases of the like kind, the transcendent power of parliament is called in, to cut the Gordian knot; and by a particular law, enacted for this very purpose, to unfetter an estate; to give its tenant reasonable powers; or to assure it to a purchaser, against the remote or latent claims of infants or disabled persons, by settling a proper equivalent in proportion to the interest so barred. This practice was carried to a great length in the year succeeding the Restoration; by setting aside many conveyances alleged to have been made by constraint, or in order to screen the estates from being forfeited during the usurpation. And at last it proceeded so far, that, as the noble historian* expresses it, every man had raised an equity in his own imagination, that he thought was entitled to prevail against any descent, testament, or act of law, and to find relief in parliament: which occasioned the king at the close of the session to remark, that the good old rules of law are the best security; and to wish, that men might not have too much cause to fear that the settlements which they make of their estate, shall be too easily unsettled, when they are dead, by the power of parliament.

Acts of this kind are, however, at present carried on, in both houses, with great deliberation and caution; particularly in the House of Lords they are usually referred to two judges to examine and report the facts alleged, and to settle all technical forms. Nothing also is done without the consent, expressly

* Lord Clarendon, *Contin.* 162.

given, of all parties in being, and capable of consent, that have the remotest interest in the matter; unless such consent shall appear to be perversely and without any reason withheld. And, as was before hinted, an equivalent in money or other estate is usually settled upon infants, or persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by this act. And a general saving is constantly added, at the close of the bill, of the right and interest of all persons whatsoever; except those whose consent is so given or purchased, and who are therein particularly named: though it hath been holden, that, even if such saving be omitted, the act shall bind none but the parties.

*A law thus made, though it binds all parties to the [*346 bill, is yet looked upon rather as a private conveyance, than as the solemn act of the legislature. It is not therefore allowed to be a *public*, but a mere *private* statute; it is not printed or published among the other laws of the session; it hath been relieved against, when obtained upon fraudulent suggestions; it hath been holden to be void, if contrary to law and reason: and no judge or jury is bound to take notice of it unless the same be specially set forth and pleaded to them. It remains, however, enrolled among the public records of the nation, to be forever preserved as a perpetual testimony of the conveyance or assurance so made or established.¹

¹ In this country, the authority of the legislature to transfer a valid title to private estates is, to a large extent, restricted by constitutional provisions. The power to take private property for public uses, in the exercise of the right of eminent domain, is well established; but this necessarily involves the payment of an appropriate measure of compensation to the owner, and is sanctioned upon no other basis. But the State has no power to transfer the property of one private citizen to another, thus changing mere individual ownership. This would be an unwarrantable interference with vested rights and legal prerogatives, guaranteed by our system of constitutional government, and such legislation would be ineffectual to divest the owner of his estate. But it is within the proper power of legislation, in many instances, to confirm defective conveyances, to control the disposition and management of property belonging to persons under disability, etc. The cases in which a legislative act may avail in creating a good title to land are thus classified by Mr. Washburn: "(1.) In confirming a title, where the proceedings or sale by which it has been attempted to convey land, have proved to be defective or incomplete, for informality. (2.) Where the owners of the land to be conveyed, have been under a disability, like that of infancy, lunacy, or the like, where the State acts as a kind of *pater patriæ*, in taking care of the

II. The *king's grants* are also matter of public record. For, as St. Germyn says, the king's excellency is so high in the law, that no freehold may be given to the king, nor derived from him but by matter of record. And to this end a variety of offices are erected, communicating in a regular subordination one with another, through which all the king's grants must pass, and be transcribed, and enrolled; that the same may be narrowly inspected by his officers, who will inform him if anything contained therein is improper, or unlawful to be granted. These grants whether of lands, honors, liberties, franchises, or aught besides, are contained in charters, or letters *patent*, that is, open letters, *literæ patentēs*: so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large. And therein they differ from certain other letters of the king, sealed also with his great seal, but directed to particular persons and for particular purposes: which therefore, not being proper for public inspection, are closed up and sealed on the outside, and are thereupon called writs *close*, *literæ clausæ*, and are recorded in the *close-rolls*, in the same manner as the others are in the *patent-rolls*.²

property of its subjects incapable of managing their own affairs. (3.) Where the sale is made for the purpose of satisfying the debts of a person deceased." (Washburn on Real Prop., vol. iii., p. 228, 5th ed.; which see for illustrative examples.)

² Grants in England by letters-patent, such as are here described, are said to be now antiquated as regards lands and other hereditaments of the nature of property. For alienations of lands and other hereditaments enjoyed by the sovereign in right of the crown, have been from time to time regulated by various Acts of Parliament, restricting them within certain limits, and making them subject to various conditions. These statutes are not of sufficient importance to the American student to require specific statement. (See Broom & H. Comm., ii. 553.)

The acquisition of title to lands by public grant, is of much consequence in the United States. By this is meant the transfer to an individual of an estate in lands which previously belonged either to the Government of the United States, or of any particular State. A very large extent of public lands, vested in the Federal Government, has been disposed of in this way, under regulations and methods prescribed by various acts of Congress. Most of these lands have been situated in the western part of the Union. In like manner, a number of the original States acquired public lands by succession to the Colonies, or by cession from the general government, which they afterwards disposed of, in whole or in part, by public grant.

Grants or letters-patent must first pass by *bill*; which is prepared by the attorney and solicitor general, in consequence *of a warrant from the crown; and is then signed, that [*347 is, subscribed at the top, with the king's own *sign manual*, and sealed with his *privy signet*, which is always in the custody of the principal secretary of state; and then sometimes it immediately passes under the great seal, in which case the patent is subscribed in these words, "*per ipsum regem*, by the king himself." Otherwise the course is to carry an extract of the bill to the keeper of the *privy seal*, who makes out a writ or warrant thereupon to the chancery; so that the sign manual is the warrant to the privy seal, and the privy seal is the warrant to the great seal: and in this last case the patent is subscribed, "*per breve de privato sigillo*, by writ of privy seal." But there are some grants which only pass through certain offices, as the admiralty or treasury, in consequence of a *sign manual*, without the confirmation of either the *signet*, the *great*, or the *privy seal*.

The *manner* of granting by the king does not more differ from that by a subject, than the *construction* of his grants, when made. 1. A grant made by the king, *at the suit of the grantee*, shall be taken most beneficially *for* the king, and *against* the party; whereas the grant of a subject is constructed most strongly *against the grantor*. Wherefore it is usual to insert in the king's grants, that they are made, not at the suit of the grantee, but "*ex speciali gratia, certa scientia, et mero motu regis*;" and then they have a more liberal construction. 2. A subject's grant shall be construed to include many things, besides what are expressed, if necessary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingress, egress, and regress, to cut and carry away those profits, are also inclusively granted: and if a feoffment of land was made by the lord to his villein, this operated as a manumission; for he was otherwise unable to hold it. But the king's grant shall not

The instrument by which a title to such lands is conveyed is called a "*patent*," and, under the laws of Congress, must be signed by the President, or some one appointed to represent him for this purpose, and must be under the seal of the United States. Like an ordinary deed, it contains a description of the premises granted, and when regularly drawn, forms a valid and effectual evidence of title. Patents under State laws are of the same general nature, though they must be under the seal of the State. (See further Washburn on Real Prop., iii., pp. 192-219, 5th ed.; *U. S. v. Schurz*, 102 U. S. 378.)

enure to any other intent, than that which is precisely expressed in the grant. As if he grants land to an alien, it operates nothing; for *such grant shall not also enure to make him a denizen, that he may be capable of taking by grant. 3. When it appears from the face of the grant, that the king is mistaken, or deceived, either in matter of fact or matter of law, as in case of false suggestion, misinformation, or misrecital of former grants : or if his own title to the thing granted be different from what he supposes ; or if the grant be informal ; or if he grants an estate contrary to the rules of law ; in any of these cases the grant is absolutely void. For instance ; if the king grants lands to one and his *heirs male*, this is merely void ; for it shall not be an estate-tail, because there want words of procreation, to ascertain the body out of which the heirs shall issue : neither is it a fee-simple, as in common grant it would be ; because it may reasonably be supposed, that the king meant to give no more than an estate-tail : the grantee is therefore (if anything) nothing more than tenant at will. And to prevent deceits of the king, with regard to the value of the estate granted, it is particularly provided by the statute 1 Hen. IV., ch. 6, that no grant of his shall be good, unless in the grantee's petition for them, express mention be made of the real value of the lands.

III. We are next to consider a very usual species of assurance, which is also of record ; *viz.* a *fine* of lands and tenements. In which it will be necessary to explain, 1. The *nature* of a fine ; 2. Its *force* and *effect*.³

1. A fine is sometimes said to be a feoffment of record : though it might with more accuracy be called an acknowledgment of a feoffment on record. By which is to be understood, that it has at least the same force and effect with a feoffment, in the conveying and assuring of lands : though it is one of those methods of transferring estates of freehold by the common-law, in *349] which livery of seizin is not necessary *to be actually given ; the supposition and acknowledgment thereof in a court

³ Fines were abolished in England, by statute 3 & 4 Will. IV., ch. 74. This method of conveyance was somewhat employed at an early period in a few American States ; but in a number of the States it has been expressly abolished, and is nowhere now in use in this country. The text of Blackstone upon this subject, and upon that of "common recoveries," which follows, has been slightly abridged, by the omission of a few passages deemed comparatively unimportant.

of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices: whereby the lands in question become, or are acknowledged to be, the right of one of the parties. In its original it was founded on an actual suit, commenced at law for recovery of the possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual, that fictitious actions were, and continue to be, every day commenced, for the sake of obtaining the same security.

A fine is so called because it puts *an end*, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter. Fines indeed are of equal antiquity with the first rudiments of the law itself; are spoken of by Glanvil and Bracton in the reigns of Hen. II. and Hen. III., as things then well known and long established; and instances have been produced of them even prior to the Norman invasion. So that the statute 18 Edw. I., called *modus levandi fines*, did not give them original, but only declared and regulated the manner in which they should be levied or carried on. And that is as follows:—

1. The party to whom the land is to be conveyed or assured, commences an action or suit at law against the other, *gener- [*350 ally an action of covenant by suing out a writ of *præcipe*, called a writ of covenant, the foundation of which is a supposed agreement or covenant, that the one shall convey the lands to the other; on the breach of which agreement the action is brought. On this writ there is due to the king, by ancient prerogative a *primer fine*, or a noble for every five marks of land sued for; that is, one-tenth of the annual value. The suit being thus commenced, then follows:—

2. The *licentia concordandi*, or leave to agree the suit. For, as soon as the action is brought, the defendant, knowing himself to be in the wrong, is supposed to make overtures of peace and accommodation to the plaintiff. Who, accepting them, but having, upon suing out the writ, given pledges to prosecute his suit, which he endangers if he now deserts it without license, he therefore applies to the court for leave to make the matter up. This leave is readily granted, but for it there is also another fine due to the king by his prerogative, which is an ancient

revenue of the crown, and is called the *king's silver*, or sometimes the *post fine*; with respect to the *primer fine* before mentioned. And it is as much as the *primer fine* and half as much more, or ten shillings for every five marks of land; that is, three-twentieths of the supposed annual value.

3. Next comes the *concord*, or agreement itself after leave obtained from the court: which is usually an acknowledgment from the deforciant (or those who keep the other out of possession) that the lands in question are the right of the complainant. And from this acknowledgment, or recognition of right, the party *351] levying the fine is called the **cognizor*, and he to whom it is levied the *cognizee*. This acknowledgment must be made either openly in the court of common pleas, or before the lord chief justice of that court; or else before one of the judges of that court, or two or more commissioners in the country, empowered by a special authority called a writ of *dedimus potestatem*, which judges and commissioners are bound by statute 18 Edw. I., st. 4, to take care that the cognizors be of full age, sound memory and out of prison. If there be any feme-covert among the cognizors, she is privately examined whether she does it willingly and freely, or by compulsion of her husband.

By these acts all the essential parts of a fine are completed: and, if the cognizor dies the next moment after the fine is acknowledged, provided it be subsequent to the day on which the writ is made returnable, still the fine shall be carried on in all its remaining parts: of which the next is:—

4. The *note* of the fine; which is only an abstract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement. This must be enrolled of record in the proper office, by direction of the statute 5 Hen. IV., ch. 14.

5. The fifth part is the *foot* of the fine, or conclusion of it: which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. Of this there are indentures made, or engrossed, at the chirographer's office, and delivered to the cognizor and the cognizee; usually beginning thus, "*hæc est finalis concordia*, this is the final agreement," and then reciting the whole proceeding at length. And thus the fine is completely levied at common law.

2. We are next to consider the *force* and *effect* of a fine. These principally depend, at this day, on the common law, and the two

statutes, 4 Hen. VII., ch. 24 and 32 Hen. VIII., ch. 36. The ancient common law, with respect to this point,* is very [*354 forcibly declared by the statute 18 Edw. I. in these words: "And the reason, why such solemnity is required in the passing of a fine, is this; because the fine is so high a bar, and of so great force, and of a nature so powerful in itself, that it precludes not only those which are parties and privies to the fine, and their heirs, but all other persons in the world, who are of full age, out of prison, of sound memory, and within the four seas, the day of the fine levied; unless they put in their claim on the foot of the fine within a year and a day." But this doctrine, of barring the right by *non-claim*, was abolished for a time by a statute made in 34 Edw. III., ch. 16, which admitted persons to claim and falsify a fine, at any indefinite distance; whereby, as Sir Edward Coke observes, great contention arose, and few men were sure of their possessions, till the parliament, held 4 Hen. VII., reformed that mischief, and excellently moderated between the latitude given by the statute and the rigor of the common law. For the statute then made, restored the doctrine of non-claim; but extended the time of claim. So that now, by that statute, the right of all strangers whatsoever is bound, unless they make claim, by way of action or lawful entry, not within *one* year and a day, as by the common law, but within *five* years after proclamations made: except feme-coverts, infants, prisoners, persons beyond the seas, and such as are not of whole mind; who have five years allowed to them and their heirs, after the death of their husbands, their attaining full age, recovering their liberty, returning into England, or being restored to their right mind.

It seems to have been the intention of that politic prince, King Henry VII., to have covertly by this statute extended fines to have been a bar of estates-tail, in order to unfetter the more easily the estates of his powerful nobility, and lay *them [*355 more open to alienations; being well aware that power will always accompany property. But doubts having arisen whether they could, by mere implication, be adjudged a sufficient bar (which they were expressly declared *not* to be by the statute *de donis*), the statute 32 Hen. VIII., ch. 36, was thereupon made; which removes all difficulties, by declaring that a fine levied by any person of full age, to whom or to whose ancestors lands have been entailed, shall be a perpetual bar to them and their heirs

claiming by force of such entail : unless the fine be levied by a woman after the death of her husband, of lands which were, by the gift of him or his ancestors, assigned to her in tail for her jointure ; or unless it be of lands entailed by act of parliament or letters patent, and whereof the reversion belongs to the crown.

From this view of the common law, regulated by these statutes, it appears, that a fine is a solemn conveyance on record from the cognizor to the cognizee, and that the persons bound by a fine are *parties*, *privies*, and *strangers*.

The *parties* are either the cognizors, or cognizees, and these are immediately concluded by the fine, and barred of any latent right they might have, even though under the legal impediment of coverture. And indeed, as this is almost the only act that a *feme-covert*, or married woman, is permitted by law to do (and that because she is privately examined as to her voluntary consent, which removes the general suspicion of compulsion by her husband), it is therefore the usual and almost the only safe method, whereby she can join in the sale, settlement, or incumbrance, of any estate.

Privies to a fine are such as are any way related to the parties who levy the fine, and claim under them by any right of blood or other right of representation. Such as are the heirs general of the cognizor, the issue in tail since the statute of Henry the Eighth, the vendee, the devisee, and all others who must make their title by the persons who levied the fine. For *356] the act of the ancestor shall bind the heir, and the act* of the principal his substitute, or such as claim under any conveyance made by him subsequent to the fine so levied.

Strangers to a fine are all other persons in the world, except only parties and privies. And these are also bound by a fine, unless, within five years after proclamations made, *they interpose their claim* ; provided they are under no legal impediments, and have then a present interest in the estate. The impediments, as hath before been said, are coverture, infancy, imprisonment, insanity, and absence beyond sea ; and persons, who are thus incapacitated to prosecute their rights, have five years allowed them to put in their claims after such impediments are removed. Persons also that have not a present, but a future interest only, as those in remainder or reversion, have five years allowed them to

claim in, from the time that such right accrues. And if within that time they neglect to claim, or (by the statute 4 Ann. ch. 16,) if they do not bring an action to try the right within one year after making such claim, and prosecute the same with effect, all persons whatsoever are barred of whatever right they may have, by force of the statute of non-claim.

But, in order to make a fine of any avail at all, it is necessary that the parties should have some interest or estate in the lands to be affected by it. Else it were possible that two strangers, by a mere confederacy, might without any risk defraud the owners by levying fines of their lands. And thus much for the conveyance or assurance by fine: which not only, like other conveyances, binds the grantor himself, and his heirs; but also all mankind, whether concerned in the transfer or no, if they fail to put in their claims within the time allotted by law.

IV. The fourth species of assurance, by matter of record, is a *common recovery*.⁴ Concerning the original of which it was formerly observed that common recoveries were invented by the ecclesiastics to elude the statutes of mortmain; and afterwards encouraged by the finesse of the courts of law in 12 Edw. IV., in order to put an end to all fettered inheritances, and bar not only estates-tail, but also all remainders and reversions expectant thereon. I am now therefore only to consider, first, the *nature* of a common recovery; and, secondly, its *force* and *effect*.

1. And, first, the *nature* of it; or what a common recovery is. A common recovery is so far like a fine, that it is a suit or action, either actual or fictitious: and in it the lands are *recovered* against the tenant of the freehold; which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoveror. A recovery therefore being in the nature of an action at law, not immediately compromised like a fine, but carried on through every regular stage of proceeding, I am greatly apprehensive that its form and method will not be easily understood by the student who is not yet acquainted *with the course of judicial proceedings; [*358

⁴ Common recoveries have been abolished in England by statute (3 & 4 Will. IV., ch. 74), and are also obsolete in the United States. But although both fines and recoveries have been done away with in both countries, the ancient rules of law upon these topics are of considerable historical importance, and have, therefore, been retained in this abridgment.

which cannot be thoroughly explained, till treated of at large in the third book of these commentaries. However I shall endeavor to state its nature and progress, as clearly and concisely as I can ; avoiding, as far as possible, all technical terms and phrases not hitherto interpreted.

Let us, in the first place, suppose David Edwards to be tenant of the freehold, and desirous to suffer a common recovery, in order to bar all entails, remainders, and reversions, and to convey the same in fee-simple to Francis Golding. To effect this, Golding is to bring an action against him for the lands ; and he accordingly sues out a writ, called a *præcipe quod reddat*, because those were its initial or most operative words, when the law proceedings were in Latin. In this writ the demandant Golding alleges that the defendant Edwards (here called the tenant) has no legal title to the land ; but that he came into possession of it after one Hugh Hunt had turned the demandant out of it. The subsequent proceedings are made up into a record or recovery roll, in which the writ and complaint of the demandant are first recited : whereupon the tenant appears, and calls upon one Jacob Morland, who is supposed, at the original purchase, to have warranted the title to the tenant ; and thereupon he prays, that the said Jacob Morland may be called in to defend the title which he so warranted. This is called the *voucher, vocatio*, or calling of Jacob Morland to warranty ; and Morland is called the *vouchee*. Upon this, Jacob Morland, the vouchee, appears, is impleaded, and defends the title. Whereupon Golding, the demandant, desires leave of the court to *imparl*, or confer with the vouchee in private ; which is (as usual) allowed him. And soon afterwards the demandant, Golding, returns to court, but Morland the vouchee disappears, or makes default. Whereupon judgment is given for the demandant, Golding, now called the recoveror, to recover the lands in question against the tenant, Edwards, who is now the *359] recoveree ; *and Edwards has judgment to recover of Jacob Morland lands of equal value, in recompense for the lands so warranted by him, and now lost by his default ; which is agreeable to the doctrine of warranty mentioned in the preceding chapter. This is called the recompense, or *recovery in value*. But Jacob Morland having no lands of his own, being usually the crier of the court (who, from being frequently thus vouched, is called the *common vouchee*), it is plain that Edwards has only a

nominal recompense for the land so recovered against him by Golding ; which lands are now absolutely vested in the said recoveror by judgment of law, and seizin thereof is delivered by the sheriff of the county. So that this collusive recovery operates merely in the nature of a conveyance in fee-simple, from Edwards the tenant in tail, to Golding the purchaser.

* This supposed recompense in value is the reason [*360 why the issue in tail is held to be barred by a common recovery. For if the recoveree should obtain a recompense in lands from the common vouchee (which there is a possibility in contemplation of law, though a very improbable one, of his doing), these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail. This reason will also hold with equal force, as to *most* remainder-men and reversioners ; to whom the possibility will remain and revert, as a full recompense for the realty, which they were otherwise entitled to : but it will not *always* hold : and therefore, as Pigot says, the judges have been even *astuti*, in inventing other reasons to maintain the authority of recoveries. And, in particular, it hath been said, that, though the estate-tail is gone from the recoveree, yet it is not *destroyed*, but *only transferred* ; and still subsists, and will ever continue to subsist (by construction of law) in the recoverer, his heirs and assigns : and, as the estate-tail so continues to subsist for ever, the remainders or reversions expectant on the determination of such an estate-tail can never take place.

To such awkward shifts, such subtle refinements, and such strange reasoning, were our ancestors obliged to have recourse, in order to get the better of that stubborn statute *de donis*. The design for which these contrivances were set on foot, was certainly laudable ; the unrivetting the fetters of estates-tail, which were attended with a legion of mischiefs to the commonwealth : but, while we applaud the end, we cannot but admire the means. Our modern courts of justice have indeed adopted a more manly way of treating the subject ; by considering common recoveries in no other light than as the formal mode of conveyance, by which tenant in tail is enabled to aliene his lands. But, since the ill consequences of fettered inheritances are now generally seen *and allowed, and of course the utility and expedience of [*361 setting them at liberty are apparent ; it hath often been wished,

that the process of this conveyance was shortened, and rendered less subject to niceties.

2. The *force* and *effect* of common recoveries may appear, from what has been said, to be an absolute bar not only of all estates-tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant in tail may, by this method of assurance, convey the lands held in tail to the recoverer, his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders and reversions.

In all recoveries it is necessary that the recoveree, or tenant to the *præcipe*, as he is usually called, be actually seized of the freehold, else the recovery is void. For all actions, to recover the seizin of lands, must be brought against the actual tenant of the freehold, else the suit will lose its effect; since the freehold cannot be recovered of him who has it not. And though these recoveries are in themselves fabulous and fictitious, yet it is necessary that there be *actores fabulæ*, properly qualified. But the nicety thought by some modern practitioners to be requisite in conveying the legal freehold, in order to make a good tenant to the *præcipe*, is removed by the provisions of the statute 14 Geo. II., ch. 20, which enacts, with a retrospect and conformity to the ancient rule of law, that, though the legal freehold be vested in lessees, yet those, who are entitled to the next freehold estate in remainder or reversion may make a good tenant to the *præcipe*;—that though the deed or fine which creates such tenant be subsequent to the judgment of recovery, yet, if it be in the same term, the recovery shall be valid in law;—and that, though the recovery itself do not appear to be entered, or be not regularly entered, on record, yet the deed to make a tenant to the *præcipe*, and declare the uses of the recovery, shall, *after a possession of twenty years, be sufficient evidence, on behalf of a purchaser for valuable consideration, that such recovery was duly suffered. And this may suffice to give the student a general idea of common recoveries, the last species of assurance by matter of record.

CHAPTER XXII.

[BL. COMM.—BOOK II. CH. XXIII.]

Of Alienation by Devise.

THE last method of conveying real property, is, by *devise*, or disposition contained in a man's last will and testament. And, in considering this subject, I shall not at present inquire into the nature of wills and testaments, which are more properly the instruments to convey personal estates ; but only into the original and antiquity of devising real estates by will, and the construction of the several statutes upon which that power is now founded.

It seems sufficiently clear, that, before the Conquest, lands were devisable by will. But, upon the introduction of the military tenures, the restraint of devising lands naturally took place, as a branch of the feudal doctrine of non-alienation without the consent of the lord. And some have questioned whether this restraint (which we may trace even from the ancient Germans) was not founded upon truer principles of policy, than the power of wantonly disinheriting the heir by will, and transferring the estate, through the dotage or caprice of the ancestor, from those of his blood to utter strangers. For this, it is alleged, maintained the balance of property, and prevented one man from growing too big or powerful for his neighbors ; since it rarely happens, *that the same man is heir to many others, though by art [*374 and management he may frequently become their devisee. Thus the ancient law of the Athenians directed that the estate of the deceased should always descend to his children ; or, on failure of lineal descendants, should go to the collateral relations : which had an admirable effect in keeping up equality, and preventing the accumulation of estates. But when Solon made a slight alteration, by permitting them (though only on failure of issue) to dispose of their lands by testament, and devise away estates from the collateral heir, this soon produced an excess of wealth in some, and of poverty in others : which, by a natural progression, first produced popular tumults and dissensions ; and these at length ended in tyranny, and the utter extinction of liberty : which was

quickly followed by a total subversion of their state and nation. On the other hand, it would now seem hard, on account of some abuses (which are the natural consequence of free agency, when coupled with human infirmity), to debar the owner of lands from distributing them after his death as the exigence of his family affairs, or the justice due to his creditors, may perhaps require. And this power, if prudently managed, has with us a peculiar propriety; by preventing the very evils which resulted from Solon's institution, the too great accumulation of property; which is the natural consequence of our doctrine of succession by primogeniture, to which the Athenians were strangers. Of this accumulation the ill effects were severely felt even in the feudal times: but it should always be strongly discouraged in a commercial country, whose welfare depends on the number of moderate fortunes engaged in the extension of trade.

However this be, we find that, by the common law of England since the Conquest, no estate, greater than for term of years, could be disposed of by testament; except only in Kent, and in some ancient burghs, and a few particular manors, where their Saxon immunities by special indulgence subsisted. And though *375] the feudal restraint on alienations by *deed* vanished very early, yet this on wills continued for some centuries after: from an apprehension of infirmity and imposition on the testator *in extremis*, which made such devises suspicious. Besides, in devises there was wanting that general notoriety, and public designation of the successor, which in descent is apparent to the neighborhood, and which the simplicity of the common law always required in every transfer and new acquisition of property.

But when ecclesiastical ingenuity had invented the doctrine of uses as a thing distinct from the land, uses began to be devised very frequently, and the devisee of the use could in chancery compel its execution. For it is observed by Gilbert, that, as the popish clergy then generally sat in the court of chancery, they considered that men are most liberal when they can enjoy their possessions no longer: and therefore at their death would choose to dispose of them to those, who, according to the superstition of the times, could intercede for their happiness in another world. But, when the statute of uses had annexed the possession to the use, these uses, being now the very land itself, became no longer devisable: which might have occasioned a great revolution in

the law of devises, had not the statute of wills been made about five years after, *viz.*, 32 Hen. VIII., ch. 1, explained by 34 Hen. VIII., ch. 5, which enacted, that all persons being *seized in fee-simple* (except feme-coverts,¹ infants, idiots, and persons of non-sane memory) might by will and testament in writing devise to any other *person*, except to bodies corporate, two-thirds of their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in socage: which now, through the alteration of tenures by the statute of Charles the Second, amounts to the whole of their landed property, except their copyhold tenements.

Corporations were excepted in these statutes, to prevent the extension of gifts in mortmain; but now, by construction *of the statute 43 Eliz., ch. 4, it is held, that a devise to a [*376 corporation for a charitable use is valid, as operating in the nature of an *appointment*, rather than of a *bequest*. And indeed the piety of the judges hath formerly carried them great lengths in supporting such charitable uses; it being held that the statute of Elizabeth, which favors appointments to charities, supersedes and repeals all former statutes, and supplies all defects of assurances: and therefore not only a devise to a corporation, but a devise by a copyhold tenant without surrendering to the use of his will, and a devise (nay even a settlement) by tenant in tail without either fine or recovery, if made to a charitable use, are good by way of appointment.²

With regard to devises in general, experience soon showed

¹ The disability of married women to devise lands by will, has been removed by statute in a number of the American States; and they have been empowered to thus dispose of their separate property as freely as a single woman. But unless removed by statute, this disability and the others contained in the English statutes of wills, are generally retained in the law of the several States. The rules of law concerning wills of *real estate* must not be confused with those in regard to testaments of *personal property*. For, by the common law, a married woman might bequeath personal estate by the consent of her husband, while male infants might do so at the age of fourteen, and female infants at the age of twelve. But these rules have also been modified by statute, in modern times, in some States; married women being empowered to hold and bequeath personal property without restriction, and infants being required to be older in order to make a testament. The statutes of the various States must be consulted as to the changes in the common law. (See *ante*, p. 158, note 24; *post*, p. 596, note 2.)

² See *ante*, p. 223, note 10, and p. 428, note 3, as to the power of corporations to take land by will, under present laws.

how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are so nicely constructed and so artificially connected together, that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this act by the courts of law, that bare notes in the hand-writing of another person were allowed to be good wills within the statute. To remedy which, the statutes of frauds and perjuries, 29 Car. II., ch. 3, directs, that all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction; and be subscribed, in his presence, by three or four credible witnesses.⁸ And a solemnity nearly similar is requisite for revoking a devise by writing; though the same may be also revoked by burning, cancelling, tearing, or obliterating thereof by the devisor, or in his presence and with his consent:⁴ as likewise *impliedly*, by such a great and entire alteration in the circumstances and situation of the devisor, as arises from marriage and the birth of a child.⁵

⁸ By the present English law, attestation by *two* witnesses is sufficient. The laws of the different American States differ upon this point, some requiring two witnesses, others three, etc.

⁴ Acts of cancellation, destruction, obliteration, &c., will not amount to a revocation, unless done in pursuance of an intent to revoke the will. (*Dan v. Brown*, 4 Cow. 483; see 73 Me. 595; 15 P. D. 20; 7 Johns. 394.) Thus the tearing up of a will does not constitute a revocation, if the testatrix were at the time under such mental excitement as incapacitated her from forming a reasonable and intelligent intention to revoke. (54 Barb. 274; 99 Ind. 588; 65 Cal. 19.) A subsequent will does not revoke a former one, unless it contains a clause of revocation, or be inconsistent with it. (See 113 N. Y. 191; 3 Barb. Ch. 158.) If, however, there be a clause of revocation, effect will be given to it, although the subsequent will makes no other disposition of certain property included in the former. (*Ex parte Thompson*, 11 Paige, 453; see *post*, p. 601, note 8; also 88 N. Y. 377; 123 Mass. 102.)

⁵ This is also the established rule in a number of the United States. (See 4 Johns. Ch. 506; 1 Denio, 27; 4 Gray, 162; 63 N. H. 475; 55 Conn. 171; 65 Md. 373.) In some States, it is also provided that the marriage of a woman revokes her will previously made. It is, moreover, the present English rule that marriage alone in all cases revokes a will of realty or personalty, except in certain cases where the will is made in the exercise of a power of appointment. (See 120 Ill. 26.)

In the construction of this last statute, it has been adjudged that the testator's name, written with his own hand, at the beginning of his will, as, "I, John Mills, do make this my last [*377 will and testament ;" is a sufficient signing, without any name at the bottom ; though the other is the safer way.⁶ It has also been determined, that though the witnesses must all see the testator sign, or at least acknowledge the signing, yet they may do it at different times. But they must all subscribe their names as witnesses *in his presence*, lest by any possibility they should mistake the instrument.⁷ And, in one case determined by the court of king's bench, the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses : for they would not allow any legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will : for, if it were established, he gained a security for his legacy or debt

⁶ It is now provided by statute in England, that the testator shall *subscribe* the will, *i. e.*, sign it at the end. Such is also the rule in a number of the United States. But in the absence of a similar statute, the common law rule prevails ; and the testator's signature in any part of the instrument will be sufficient, if written for the purpose of authenticating it as a will. If the testator cannot write, it will be sufficient, if he makes his mark. (*Jackson v. Jackson*, 39 N. Y. 153.) So it has been held that, if the testator is too weak from sickness to sign his name, his hand may be guided by another, if not done against his will. (*Van Hanswyck v. Wiese*, 44 Barb. 494.)

⁷ This rule has been changed by statute in some of the American States. Thus it is not necessary in New York that the witnesses should sign *in the presence* of the testator. (*Lyon v. Smith*, 11 Barb. 124.) The formalities necessary to the due execution of a will are matters commonly of statutory regulation, and the statutes of various States differ in important respects, in their provisions upon this subject. The statute of New York may be referred to, as illustrative of changes which have been made in this country in the English law. This provides—(1.) That wills of real or personal property, or both, shall be subscribed by the testator at the end of the will. (2.) Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses. (3.) The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament. (This is termed the "publication" of the will. See 95 N. Y. 494 ; 44 N. J. Eq. 154.) (4.) There shall be two attesting witnesses ; each of whom shall sign his name as a witness at the end of the will, at the request of the testator. (2 R. S. 63.)

from the real estate, whereas otherwise he had no claim but on the personal assets. This determination, however, alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom, that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues (and these are the persons most likely to be present in the testator's last illness), and if in such case the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II., ch. 6, which restored both the competency and the credit of such *legatees*, by declaring void all legacies, given to witnesses, and thereby removing all possibility of their interest affecting their testimony. The same statute likewise established the competency of *creditors*, by directing the testimony of all such creditors to be admitted, but leaving their credit (like that of all other witnesses) to be considered, on a view of *378] all the circumstances, by the court *and jury before whom such will shall be contested. And in a much later case the testimony of three witnesses who were creditors, was held to be sufficiently credible, though the land was charged with the payment of debts; and the reasons given on the former determination was said to be insufficient.⁸

Another inconvenience was found to attend this new method

⁸ The statute 1 Vict., ch. 26, having repealed the Act of Geo. II., reenacts and extends some of its provisions. It avoids bequests, not only to an attesting witness, but to the husband or wife of such witness; and expressly provides that the incompetency of a witness to prove the execution of a will, shall not render it invalid. It further enacts that any *creditor*, or the wife or husband of any creditor, whose debt is charged upon the property devised or bequeathed by the will, may be admitted to prove the execution thereof as an attesting witness; and that an *executor* of a will may be admitted to prove its execution,—a point on which some doubts had previously existed. (KERR.)

Similar statutes have been passed in a number of the American States. Thus, in New York, it is provided that if any person takes a beneficial interest under a will, and the will cannot be proved without his testimony, the interest will be void, so far as concerns himself or those claiming under him, and he shall be a competent witness and compellable to testify. (See Jarman on Wills, I. 71, Bigelow's ed.)

of conveyance by devise; in that creditors by bond and other specialties, which affected the *heir*, provided he had assets by descent, were now defrauded of their securities, not having the same remedy against the *devisee* of their debtor. To obviate which, the statute 3 & 4 W. & M., ch. 14, hath provided, that all wills and testaments, limitations, dispositions, and appointments of real estates, by tenants in fee-simple or having power to dispose by will, shall (as against such creditors only) be deemed to be fraudulent and void, and that such creditors may maintain their actions jointly against both the heir and the devisee.⁹

A will of lands, made by the permission and under the control of these statutes, is considered by the courts of law not so much in the nature of a testament, as of a conveyance declaring the uses to which the land shall be subject: with this difference, that in other conveyances the actual *subscription* of the witnesses is not required by law, though it is prudent for them so to do, in order to assist their memory when living, and to supply their evidence when dead; but in devises of lands such subscription is now absolutely necessary by statute, in order to identify a conveyance which in its nature can never be set up till after the death of the devisor. And upon this notion, that a devise affecting lands is merely a species of conveyance, is founded this distinction between such devises and testaments of personal chattels; that the latter will operate upon whatever the testator dies possessed of, the former only upon such real estates as were his at the time of executing and publishing his will. Wherefore no *after-purchased lands will pass under such devise, [*379 unless, subsequent to the purchase or contract, the devisor republishes his will.¹⁰

We have now considered the several species of common assurances, whereby a title to lands and tenements may be transferred and conveyed from one man to another. But, before we

⁹ This statute has been repealed by subsequent acts, which, however, are in furtherance of the same policy, and make the claims of creditors upon the estate of the deceased prior to those of devisees and legatees. In the respective States of the Union, similar statutes have been enacted.

¹⁰ But the Wills Act (1 Vict., ch. 26,) has changed the law in this respect; and all property to which a man is entitled at the time of his death, passes by his will. The will takes effect as if executed immediately before the testator's death, unless it contains the specific expression of a different intention. Such is also the generally established doctrine in the United States.

conclude this head, it may not be improper to take notice of a few general rules and maxims, which have been laid down by courts of justice, for the construction and exposition of them all. These are :—

1. That the construction be *favorable*, and as near the minds and apparent intents of the parties, as the rules of law will admit. For the maxims of law are, that “*verba intentioni debent inservire* ;” and “*benigne interpretamur chartas propter simplicitatem laicorum*.” And therefore the construction must also be *reasonable*, and agreeable to common understanding.¹¹

2. That *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est* : but that, where the *intention* is clear, too minute a stress be not laid on the strict and precise signification of *words* ; *nam qui hæret in litera, hæret in cortice*. Therefore, by a grant of a remainder a reversion may well pass, and *e converso*. And another maxim of law is, that “*mala grammatica non vitiat chartam* ;” neither false English nor bad Latin will destroy a deed. Which perhaps a classical critic may think to be no unnecessary caution.¹²

3. That the construction be made upon the entire deed, and not merely upon disjointed parts of it. “*Nam ex antecedentibus *380] et consequentibus fit optima interpretatio*.” And *therefore that every part of it be (if possible) made to take effect : and no word but what may operate in some shape or other. “*Nam verba debent intelligi cum effectu, ut res magis valeat quam pereat*.”¹³

4. That the deed be taken most strongly against him that is the agent or contractor, and in favor of the other party. “*Verba fortius accipiuntur contra proferentem*.” As, if tenant in fee-simple grants to any one an estate for life, generally, it shall be construed an estate for the life of the grantee. For the principle of self-preservation will make men sufficiently careful, not to prejudice their own interest by the too extensive meaning of their words : and hereby all manner of deceit in any grant is avoided ; for men would always affect ambiguous and intricate

¹¹ See *Tucker v. Meeks*, 2 Sweeney (N.Y.), 736, 52 N.Y. 638 ; *Ash v. Coleman*, 24 Barb. 645 ; *Ingalls v. Cole*, 47 Me. 530 ; *Given v. Hilton*, 95 U. S. 591.

¹² *Riggs v. Palmer*, 115 N. Y. 510 ; *Reeves v. Topping*, 1 Wend. 388 ; *Henshaw v. Foster*, 9 Pick. 317 ; *DeNottebeck v. Astor*, 13 N. Y. 98.

¹³ *Rogers v. Rogers*, 3 Wend. 526 ; *Rich v. Hawxhurst*, 114 N. Y. 512 ; *Salstonstall v. Sanders*, 11 Allen, 446.

expressions, provided they were afterwards at liberty to put their own construction upon them. But here a distinction must be taken between an indenture and a deed-poll: for the words of an indenture, executed by both parties, are to be considered as the words of them both; for, though delivered as the words of one party, yet they are not his words only, because the other party hath given his consent to every one of them. But in a deed-poll, executed only by the grantor, they are the words of the grantor only, and shall be taken most strongly against him. And, in general, this rule, being a rule of some strictness and rigor, is the last to be resorted to; and is never to be relied upon, but where all other rules of exposition fail.¹⁴

5. That, if the words will bear two senses, one agreeable to, and another against law; that sense be preferred, which is most agreeable thereto. As if tenant in tail lets a lease to have and to hold during life generally, it shall be construed to be a lease for his own life only, for that stands with the law; and not for the life of the lessee, which is beyond his power to grant.¹⁵

*6. That, in a deed, if there be two clauses so totally [*381 repugnant to each other, that they cannot stand together, the first shall be received, and the latter rejected; wherein it differs from a will: for there, of two such repugnant clauses the latter shall stand. Which is owing to the different natures of these two instruments; for the first deed and the last will are always most available in law. Yet in both cases we should rather attempt to reconcile them.¹⁶

7. That a devise be most favorably expounded, to pursue if possible the will of the devisor, who for want of advice or learning may have omitted the legal or proper phrases.¹⁷ And therefore many times the law dispenses with the want of words in devises, that are absolutely requisite in all other instruments. Thus, a fee may be conveyed without words of inheritance; and

¹⁴ *Douglas v. Lewis*, 131 U. S. 75; *Coleman v. Beach*, 97 N. Y. 545; *Morse v. Marshall*, 13 Allen, 288.

¹⁵ See *Hobbs v. McLean*, 117 U. S. 567; *Post v. Hoover*, 33 N. Y. 593; *Butler v. Butler*, 3 Barb. Ch. 304.

¹⁶ See *Tucker v. Meeks*, 2 Sweeney, 736, 52 N. Y. 638; *Van Nostrand v. Moore*, 52 N. Y. 12; *Woodbury v. Woodbury*, 74 Me. 413. But these rules will not be applied, except in cases of clear and unmistakable inconsistency.

¹⁷ See *Sherwood v. Sherwood*, 3 Bradford, 230; *Phillips v. Davies*, 92 N. Y. 199; *Lytle v. Beveridge*, 58 N. Y. 592; *Colton v. Colton*, 127 U. S. 300.

an estate-tail without words of procreation. By a will also an estate may pass by mere implication, without any express words to direct its course. As, where a man devises lands to his heir at law, after the death of his wife: here, though no estate is given to the wife in express terms, yet she shall have an estate for life by implication; for the intent of the testator is clearly to postpone the heir till after her death; and, if she does not take it, nobody else can. So, also, where a devise is of black-acre to A. and of white-acre to B. in tail, and if they both die without issue, then to C. in fee; here A. and B. have *cross-remainders* by implication, and on the failure of either's issue, the other or his issue shall take the whole; and C.'s remainder over shall be postponed till the issue of both shall fail. But, to avoid confusion, no such cross-remainders are allowed between more than two devisees;¹⁸ and, in general, where any implications are allowed, they must be such as are *necessary* (or at least highly *382] *probable*) and not merely *possible* implications. And herein there is no distinction between the rules of law and of equity; for the will, being considered in both courts in the light of a limitation of uses, is construed in each with equal favor and benignity, and expounded rather on its own particular circumstances, than by any general rules of positive law.

And thus we have taken a transient view, in this and the three preceding chapters, of a very large and diffusive subject, the doctrine of common assurances: which concludes our observations on the *title* to things real, or the means by which they may be reciprocally lost and acquired. We have before considered the *estates* which may be had in them, with regard to their duration or quantity of interest, the time of their enjoyment, and the number and connections of the persons entitled to hold them: we have examined the *tenures*, both ancient and modern, whereby those estates have been, and are now, holden: and have distinguished the object of all these inquiries, namely, things real into the corporeal or substantial, and incorporeal or ideal *kind*; and have thus considered the rights of real property in every light wherein they are contemplated by the laws of England. A system of laws, that differs much from every other system, ex-

¹⁸ [The contrary has been fully established. In a will there may be cross-remainders among any number by implication, where it is the manifest intention of the testator.] (See *Hall v. Priest*, 6 Gray, 18.)

cept those of the same feudal origin, in its notions and regulations of landed estates ; and which therefore could in this particular be very seldom compared with any other.

The subject which has thus employed our attention, is of very extensive use, and of as extensive variety. And yet, I am afraid, it has afforded the student less amusement and pleasure in the pursuit, than the matters discussed in the preceding book. To say the truth, the vast alterations which the doctrine of real property has undergone from the Conquest to the present time ; the infinite determinations upon points that continually arise, and which have been heaped one upon another for a course of seven centuries, without any order or *method ; and the multi- [*383 plicity of acts of parliament which have amended, or sometimes only altered, the common law : these causes have made the study of this branch of our national jurisprudence a little perplexed and intricate. It hath been my endeavor principally to select such parts of it as were of the most general use, where the principles were the most simple, the reasons of them the most obvious, and the practice the least embarrassed. Yet I cannot presume that I have always been thoroughly intelligible to such of my readers, as were before strangers even to the very terms of art which I have been obliged to make use of ; though, whenever those have first occurred, I have generally attempted a short explication of their meaning. These are indeed the more numerous, on account of the different languages, which our law has at different periods been taught to speak ; the difficulty arising from which will insensibly diminish by use and familiar acquaintance. And therefore I shall close this branch of our inquiries with the words of Sir Edward Coke : " Albeit the student shall not at any one day, do what he can, reach to the full meaning of all that is here laid down, yet let him no way discourage himself, but proceed : for on some other day, in some other place " (or perhaps upon a second perusal of the same), " his doubts will be probably removed."

CHAPTER XXIII.

[BL. COMM.—BOOK II. CH. XXIV.]

Of Things Personal.

UNDER the name of things *personal* are included all sorts of things *movable*, which may attend a man's person wherever he goes; and therefore, being only the objects of the law while they remain within the limits of its jurisdiction, and being also of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature more permanent and *immovable*, as land and houses and the profits issuing thereout. These being constantly within the reach, and under the protection of the law, were the principal favorites of our first legislators: who took all imaginable care in ascertaining the rights, and directing the disposition, of such property as they imagined to be lasting, and which would answer to posterity the trouble and pains that their ancestors employed about them; but at the same time entertained a very low and contemptuous opinion of all personal estate, which they regarded as only a transient commodity. The amount of it indeed was comparatively very trifling, during the scarcity of money and the ignorance of luxurious refinements which prevailed in the feudal ages. Hence it was, that a tax of the *fifteenth, tenth*, or sometimes a much larger proportion, of all the movables of the subject, was frequently laid without scruple, and is mentioned with much unconcern by our ancient historians, though now it would justly alarm our opulent merchants and stockholders. And hence *385] *likewise may be derived the frequent forfeitures inflicted by the common law, of *all* a man's goods and chattels, for misbehaviors and inadvertencies that at present hardly seem to deserve so severe a punishment. Our ancient law-books, which are founded upon the feudal provisions, do not therefore often condescend to regulate this species of property. There is not a chapter in Britton or the Mirror, that can fairly be referred to this head; and the little that is to be found in Glanvil, Bracton,

and Fleta, seems principally borrowed from the civilians. But of later years, since the introduction and extension of trade and commerce, which are entirely occupied in this species of property, and have greatly augmented its quantity and of course its value, we have learned to conceive different ideas of it. Our courts now regard a man's personalty in a light nearly, if not quite, equal to his realty : and have adopted a more enlarged and less technical mode of considering the one than the other ; frequently drawn from the rules which they found already established by the Roman law, wherever those rules appeared to be well grounded and apposite to the case in question, but principally from reason and convenience, adapted to the circumstances of the times ; preserving withal a due regard to ancient usages, and a certain feudal tincture, which is still to be found in some branches of personal property.

But things personal, by our law, do not only include things *movable* but also something more : the whole of which is comprehended under the general name of *chattels*, which, Sir Edward Coke says, is a French word signifying goods. The appellation is in truth derived from the technical Latin word, *catalla* : which primarily signified only beasts of husbandry, or (as we still call them) *cattle*, but in its secondary sense was applied to all movables in general. In the *grand coustumier* of Normandy a *chattel* is described as a mere movable, but at the same time it is set in opposition to a fief or feud : so that not only goods, but whatever was not a feud, were accounted chattels. *And [*386 it is in this latter, more extended, negative sense, that our law adopts it ; the idea of goods, or movables only, being not sufficiently comprehensive to take in every thing that the law considers as a chattel interest. For since, as the commentator on the *coustumier* observes, there are two requisites to make a fief or heritage, duration as to time, and immobility with regard to place ; whatever wants either of these qualities is not, according to the Normans, a heritage or fief ; or, according to us, is not a *real* estate : the consequence of which in both laws is, that it must be a personal estate, or chattel.

Chattels therefore are distributed by the law into two kinds ; chattels *real*, and chattels *personal*.

1. Chattels *real*, saith Sir Edward Coke, are such as concern, or savor of, the realty ; as terms for years of land, wardships in

chivalry (while the military tenures subsisted), the next presentation to a church, estates by a statute-merchant, statute-staple, *elegit*, or the like ; of all which we have already spoken. And these are called real chattels, as being interests issuing out of, or annexed to, real estates : of which they have one quality, *viz.* immobility, which denominates them *real* ; but want the other, *viz.* a sufficient, legal, indeterminate duration ; and this want it is, that constitutes them *chattels*. The utmost period for which they can last is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out of such a particular income ; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life : their tenants were considered upon feudal principles, as merely bailiffs or farmers ; and the tenant of the freehold might at any time have destroyed their interest, till the reign of Henry VIII. A freehold, which alone is a real estate, and seems (as has been said) to answer to the fief in Normandy, is conveyed *387] by corporal investiture and *livery of seizin ; which gives the tenant so strong a hold of the land, that it never after can be wrested from him during his life, but by his own act, of voluntary transfer or of forfeiture ; or else by the happening of some future contingency, as in estates *pur autre vie*, and the determinable freeholds mentioned in a former chapter. And even these, being of an uncertain duration, may by possibility last for the owner's life ; for the law will not presuppose the contingency to happen before it actually does, and till then the estate is to all intents and purposes a life-estate, and therefore a freehold interest. On the other hand, a chattel interest in lands, which the Normans put in opposition to fief, and we to freehold, is conveyed by no seizin or corporal investiture, but the possession is gained by the mere entry of the tenant himself ; and it will certainly expire at a time prefixed and determined, if not sooner. Thus a lease for years must necessarily fail at the end and completion of the term ; the next presentation to a church is satisfied and gone the instant it comes into possession, that is, by the first avoidance and presentation to the living ; the conditional estates by statutes and *elegit* are determined as soon as the debt is paid ; and so guardianships in chivalry expired of course the moment that the heir came of age. And if there be any other chattel real, it will be found to correspond with the rest in this essential quality

that its duration is limited to a time certain, beyond which it cannot subsist.

2. Chattels *personal* are, properly and strictly speaking, things *movable*; which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and every thing else that can properly be put in motion, and transferred from place to place. And of this kind of chattels it is, that we are principally to speak in the remainder of this book; having been unavoidably led to consider the nature of chattels real, and their incidents, in the former chapters, which were *employed upon real estates: that [*388 kind of property being of a mongrel amphibious nature, originally endowed with one only of the characteristics of each species of things; the immobility of things real, and the precarious duration of things personal.

Chattel interests being thus distinguished and distributed, it will be proper to consider, first, the nature of that *property*, or dominion, to which they are liable; which must be principally, nay solely, referred to personal chattels: and, secondly, the *title* to that property, or how it may be lost and acquired. Of each of these in its order

CHAPTER XXIV.

[BL. COMM. — BOOK II. CH. XXV.]

Of Property in Things Personal.

PROPERTY in chattels personal may be either in *possession*: which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing: or else it is in *action*; where a man hath only a bare right, without any occupation or enjoyment. And of these the former, or property in *possession*, is divided into two sorts, an *absolute* and a *qualified* property.

I. First, then, of property in *possession absolute*, which is where a man hath, solely and exclusively, the right, and also the occupa-

tion, of any movable chattels; so that they cannot be transferred from him, or cease to be his, without his own act or default. Such may be all *inanimate* things, as goods, plate, money, jewels, implements of war, garments, and the like: such also may be all *vegetable* productions, as the fruit or other parts of a plant, when severed from the body of it; or the whole plant itself, when severed from the ground; none of which can be moved out of the owner's possession without his own act or consent, or at least without doing him an injury, which it is the business of the law to prevent or remedy. Of these therefore there remains little to be said.

But with regard to *animals* which have in themselves a principle and power of motion, and (unless particularly confined) can convey themselves from one part of the world to another, there *390] is a great difference made with respect to *their several classes, not only in our law, but in the law of nature and of all civilized nations. They are distinguished into such as are *domitæ*, and such as are *feræ naturæ*: some being of a *tame* and others of a *wild* disposition. In such as are of a nature tame and domestic (as horses, kine, sheep, poultry, and the like), a man may have as absolute a property as in any inanimate beings; because these continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property: in which our law agrees with the laws of France and Holland. The stealing, or forcible abduction, of such property as this, is also felony; for these are things of intrinsic value, serving for the food of man; or else for the uses of husbandry. But in animals *feræ naturæ* a man can have no absolute property.

Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; ¹ the English law agreeing with the civil, that "*partus sequitur ventrem*" in the brute creation, though for the most part in the human species it disallows that maxim. And therefore in the laws of England as well as Rome, "*si equam meam equus tuus prægnantem fecerit, non est tuum sed meum quod natum est.*" And, for this Puffendorf gives a sensible reason: not only because the male is frequently

¹ But if animals are *hired*, the hirer is entitled to the increase during the time of the letting. (*Concklin v. Havens*, 12 Johns. 314; *Putnam v. Wjley*, 8 id. 432; see 130 U. S. 69.)

unknown ; but also because the dam, during the time of her pregnancy, is almost useless to the proprietor, and must be maintained with great expense and care : wherefore as her owner is the loser by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is in the case of young cygnets ; which belong equally to the owner of the cock and hen, and shall be divided between them. But here the reasons of the general rule cease, and "*cessante *ratione cessat et ipsa lex*:" for [*391 the male is well known, by his constant association with the female ; and for the same reason the owner of the one doth not suffer more disadvantage, during the time of pregnancy and nurture, than the owner of the other.

II. Other animals, that are not of a tame and domestic nature, are either not the objects of property at all, or else fall under our other division, namely, that of *qualified, limited, or special* property ; which is such as is not in its nature permanent, but may sometimes subsist, and at other times not subsist. In discussing which subject, I shall in the first place show, how this species of property may subsist in such animals as are *feræ naturæ*, or of a wild nature ; and then how it may subsist in any other things, when under particular circumstances.

First then, a man may be invested with a qualified, but not an absolute, property in all creatures that are *feræ naturæ*, either *per industriam, propter impotentiam, or propter privilegium*.

I. A qualified property may subsist in animals *feræ naturæ per industriam hominis*: by a man's *reclaiming* and making them tame by art, industry, and education ; or by so confining them within his own immediate power, that they cannot escape and use their natural liberty. And under this head some writers have ranked all the former species of animals we have mentioned, apprehending none to be originally and naturally tame, but only made so by art and custom : as horses, swine, and other cattle, which if originally left to themselves, would have chosen to rove up and down, seeking their food at large, and are only made domestic by use and familiarity : and are therefore, say they, called *mansueta, quasi manui assueta*. But however well this motion may be founded, abstractly considered, our law apprehends the most obvious distinction to be, between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, which it calls *domitæ naturæ* : and such

creatures as are usually found at liberty, which are therefore *392] supposed to be more emphatically *feræ naturæ*,* though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man. Such as are deer in a park, hares or rabbits in an enclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man than while they continue in his keeping or actual possession : but if at any time they regain their natural liberty, his property instantly ceases ; unless they have *animus revertendi*, which is only to be known by their usual custom of returning. A maxim which is borrowed from the civil law ; “ *revertendi animus videntur desiderare habere tunc, cum revertendi consuetudinem deseruerint.*” The law therefore extends this possession farther than the mere manual occupation ; for my tame hawk that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property : for he hath *animus revertendi*. So are my pigeons, that are flying at a distance from their home (especially of the carrier kind), and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester ; all which remain still in my possession, and I still preserve my qualified property in them.² But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them. But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure ; or if a wild swan is taken, and marked and turned loose in the river, the owner’s property in him still continues, and it is not lawful for any one else to take him ; but otherwise, if the deer has been long absent without returning, or the swan leaves the neighborhood. Bees also are *feræ naturæ* ; but, when hived and reclaimed, a man may have a qualified property in them, by the *393] law of nature, as well as by the civil law. *And to the same purpose, not to say in the same words, with the civil law, speaks Bracton : occupation, that is, hiving or including them, gives the property in bees ; for though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nests thereon, and

² See *Amory v. Flynn*, 10 Johns. 102.

therefore if another hives them, he shall be their proprietor : but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight, and have power to pursue them ; and in these circumstances no one else is entitled to take them.^a But it hath been also said that with us the only ownership in bees is *ratione soli* : and the charter of the forest which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found.

In all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible : a property, that may be destroyed if they resume their ancient wildness and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *feræ naturæ* again ; and are free and open to the first occupant that hath ability to seize them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law, as if they were absolutely and indefeasibly mine ; and an action will lie against any man that detains them from me, or unlawfully destroys them. It is also as much felony by common law to steal such of them as are fit for food, as it is to steal tame animals, but not so, if they are only kept for pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots, and singing-birds ; because their value is not intrinsic, but depending only on the caprice of the owner : † though it is such an invasion of property as may * amount to a civil injury, and be re- [*394 dressed by a civil action. Yet to steal a reclaimed hawk is felony both by common law and statute ; which seems to be a relic of the tyranny of our ancient sportsmen. And, among our elder ancestors, the ancient Britons, another species of reclaimed animals, *viz.*, cats, were looked upon as creatures of intrinsic value ; and the killing or stealing one was a grievous crime, and subjected the offender to a fine ; especially if it belonged to the king's household, and was the *custos horrei regii*, for which there was a very peculiar forfeiture. And thus much of qualified property in wild animals, reclaimed *per industriam*.

^a *Gillet v. Mason*, 7 Johns. 16 ; *Ferguson v. Miller*, 1 Cow. 243 ; *Goff v. Kilt*, 15 Wend. 550 ; *Rexroth v. Coon*, 15 R. I. 35.

† See *post*, page 970.

2. A qualified property may also subsist with relation to animals *feræ naturæ, ratione impotentia*, on account of their own inability. As when hawks, herons, or other birds build in my trees, or coney or other creatures make their nests or burrows in my land, and have young ones there; I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires: but, till then, it is in some cases trespass, and in others felony, for a stranger to take them away. For here, as the owner of the land has it in his power to do what he pleases with them, the law therefore vests a property in him of the young ones, in the same manner as it does of the old ones if reclaimed and confined; for these cannot through weakness, any more than the others through restraint, use their natural liberty and forsake him.

3. A man may, lastly, have a qualified property in animals *feræ naturæ, propter privilegium*: that is he may have the privilege ^{*395} of hunting, taking, and killing them, in ^{*}exclusion of other persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty; and may restrain any stranger from taking them therein: but the instant they depart into another liberty, this qualified property ceases. The manner, in which this privilege is acquired, will be shown in a subsequent chapter.

The qualified property which we have hitherto considered extends only to animals *feræ naturæ*, when either reclaimed, impotent, or privileged. Many other things may also be the objects of qualified property. It may subsist in the very elements, of fire or light, of air, and of water. A man can have no absolute permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer. If a man disturbs another, and deprives him of the lawful enjoyment of these; if one obstructs another's ancient windows,⁴ corrupts the air of his house or gardens, fouls his water, or unpens and lets it out, or if he diverts an ancient watercourse

⁴ The English doctrine, that a prescriptive right may be gained to the enjoyment of light and air across another's premises, has been generally discarded in this country. (See *Parker v. Foote*, 19 Wend. 309; *Myers v. Gemmel*, 10 Barb. 537; *Keats v. Hugo*, 115 Mass. 204; see *ante*, p. 232, note.)

that used to run to the other's mill or meadow ; the law will animadvert hereon as an injury, and protect the party injured in his possession. But the property in them ceases the instant they are out of possession ; for, when no man is engaged in their actual occupation, they become again common, and every man has an equal right to appropriate them to his own use.

These kinds of qualification in property depend upon the peculiar circumstances of the subject-matter, which is not capable of being under the absolute dominion of any proprietor. But property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership. *As in case of [*396 *bailment*, or delivery of goods to another person for a particular use ; as to a carrier to convey to London, to an innkeeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or the bailee, the person delivering, or him to whom it is delivered : for the bailor hath only the right, and not the immediate possession ; the bailee hath the possession, and only a temporary right. But it is a qualified property in them both ; and each of them is entitled to an action, in case the goods be damaged or taken away : the bailee, on account of his immediate possession ; the bailor, because the possession of the bailee is, immediately, his possession also.⁶ So also in case of

⁶ The bailor is usually said, in such cases, to have a *general* right of property in the goods, whilst the bailee has a *special* or *qualified* ownership. For any injury to, or interference with, the possessory interest in the property, as by wrongfully taking or appropriating it, destroying it, etc., either bailor or bailee may bring suit against the wrong-doer, when the bailment is of such a kind that the bailor has a right to resume possession at any time ; as, *e. g.*, in cases of lending, entrusting goods to a carrier, or to a warehouseman, or depositary, etc. But an action by one of these parties will bar any right of action by the other. (See *Armory v. Delamirie*, 1 Smith's Leading Cases ; also 136 Mass. 57 ; 95 Ind. 302 ; 19 Ill. App. 425.) The forms of action which are applicable for injuries to the possessory interest in chattels, and to which these rules apply, are trespass, trover, and replevin. But if the bailment be of such a kind that the bailee has a right to retain the goods for a certain period, even as against the bailor, as in the case of hiring for a definite time, the bailee only can bring one of these possessory actions, since he alone has the immediate right of possession. The bailor, however, in such a case, can bring an action for a permanent injury to the property damaging his reversionary interest ; and as this action is based upon an injury to a different interest in the goods, it will not bar the suit of

goods pledged or pawned upon condition, either to repay money or otherwise ; both the pledgor and pledgee have a qualified, but neither of them an absolute, property in them: the pledgor's property is conditional, and depends upon the performance of the condition of repayment, &c. ; and so too is that of the pledgee, which depends upon its non-performance. The same may be said of goods distrained for rent, or other cause of distress : which are in the nature of a pledge, and are not, at the first taking, the absolute property of either the distreiner, or party distrained upon ; but may be redeemed, or else forfeited, by the subsequent conduct of the latter. But a servant, who hath the care of his master's goods or chattels, as a butler of plate, a shepherd of sheep, and the like, hath not any property or possession either absolute or qualified, but only a mere charge or oversight.

Having thus considered the several divisions of property in *possession*, which subsists there only, where a man hath both the right and also the occupation of the thing ; we will proceed next to take a short view of the nature of property in *action*, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question ; the possession whereof may however be recovered by a suit or action at law ; from whence *397] the thing so recoverable is called *a thing, or, *chose in action*. Thus money due on a bond is a *chose* in action ; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law. If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a *chose* in action ; for though a right to some recompense vests in me at the time of damage done, yet what and how large such recompense shall be, can only be ascertained by verdict ; and the possession can only be given me by legal judgment the bailee, but will be a cumulative remedy. Thus, where a person let furniture for a certain time to his tenant, it was held that the landlord could not maintain trover against another who wrongfully converted it to his own use. (See *Gordon v. Harper*, 7 Term Reports, 9 ; *Ward v. Macaulay*, 4 id. 489.) Moreover, if a bailee does any act wholly inconsistent with his duty in relation to the goods, as by destroying or selling them, etc., the bailor's right of immediate possession revives, and he may maintain trespass or trover against the bailee himself. (See *Dicey on Parties to Actions*, pp. 345-380.) And a bailee may recover the value of his special property from the bailor, if the latter wrongfully deprives him of the goods. (133 Mass. 423 ; 91 N. Y. 346.)

and execution. In the former of these cases the student will observe, that the property, or right of action, depends upon an *express* contract or obligation to pay a stated sum : and in the latter it depends upon an *implied* contract, that if the covenantor does not perform the act he engaged to do, he shall pay me the damages I sustain by this breach of covenant. And hence it may be collected, that all property in action depends entirely upon contracts, either express or implied ; which are the only regular means of acquiring a *chose* in action, and of the nature of which we shall discourse at large in a subsequent chapter.⁶

At present we have only to remark, that upon all contracts or promises, either express or implied, and the infinite variety of cases into which they are and may be spun out, the law gives an action of some sort or other to the party injured in case of non-performance ; to compel the wrongdoer to do justice to the party with whom he has contracted, and, on failure of performing the identical thing he engaged to do, to render a satisfaction equivalent to the damage sustained. But while the thing, or its equiv-

⁶ There are, however, many rights of action arising out of *tortious* injuries ; as, for instance, for trespass to person or property, for slander or libel, for damages caused by fraud or negligence, etc. These cannot be said to depend upon contract, unless the word "contract" be used in an enlarged, general sense, to denote the obligation impliedly assumed by every member of society, that he will do no injury to his fellow-citizens. But this is not the ordinary legal meaning of the word, so that it may be said that choses in action arise both out of contract and of tort.

It was the rule of the common law that *choses* in action were not assignable. Their assignment was deemed of pernicious tendency, as promoting strife and litigation, and was therefore forbidden. But this rigid rule was relaxed in courts of equity, which sanctioned such assignments, and regarded the assignor as a trustee for the assignee. And, subsequently, courts of law so far departed from the former legal doctrine as to permit the assignee to sue upon the instrument, in the name of the assignor. It has been the tendency of legislation, in modern times, to authorize the making of such assignments, and to allow the assignee to bring action in his own name even in courts of law. Such is the general law in New York, and many other American States, as to causes of action arising out of contract. If the cause of action arise out of tort, it is generally held to be assignable, when it concerns property, but not when the tort is personal. Thus, a right of action for the wrongful appropriation or conversion of personal chattels would be assignable, but not a right to sue for assault and battery. (See *Dana v. Fiedler*, 12 N. Y. 40 ; *Zabriskie v. Smith*, 13 N. Y. 322 ; *Hegerich v. Keddie*, 99 N. Y. 258 ; also 25 Fed. Rep. 786 ; 86 Mo. 613 ; 45 Mich. 153 ; 1 Pet. 193 ; N. Y. Code Civ. Pro. § 1910.)

alent, remains in suspense, and the injured party has only the right and not the occupation, it is called a *chose* in action; being a thing rather in *potentia* than in *esse*: though the owner may *398] have as *absolute a property in, and be as well entitled to, such things in action, as to things in possession.

And, having thus distinguished the different *degree* or *quantity* of *dominion* or *property* to which things personal are subject, we may add a word or two concerning the *time* of their *enjoyment*, and the *number* of their *owners*: in conformity to the method before observed in treating of the property of things real.

First, as to the *time of enjoyment*. By the rules of the ancient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels; because, being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitations in remainder were *generally* tolerated and allowed. But yet in last wills and testaments such limitations of personal goods and chattels, in remainder after a bequest for life, were permitted: though originally that indulgence was only shown, when merely the use of the goods, and not the goods themselves, was given to the first legatee; the property being supposed to continue all the time in the executor of the devisor. But now that distinction is disregarded: and therefore if a man either by deed or will limits his books or furniture to A. for life, with remainder over to B., this remainder is good.⁷ But, where an estate-tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation. For this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of

⁷ It is a general rule, that personal property may be given or bequeathed to one person for life, with a remainder over to another person. (*Underhill v. Tripp*, 24 How. Pr. 51; see 120 Ill. 261.) The person having the temporary interest has only a right to the reasonable use of the property, and must do no wilful or unnecessary injury to it while it continues in his possession. But if the chattels are such that their proper use consists in their consumption, as, *e. g.*, provisions, fruit, etc., the first taker has the absolute ownership therein, and the remainder is invalid. (*Gillespie v. Miller*, 5 Johns. Ch. 21; *Westcott v. Cady*, *id.* 334; see 64 N. Y. 278; 80 Me. 297; 33 W. Va. 72.)

barring the entail ; and therefore the law vests in him at once the entire dominion of goods, being analogous to the fee-simple which a tenant in tail may acquire in a real estate.

* Next, as to the *number of owners*. Things personal may [*399 belong to their owners, not only in severalty, but also in joint-tenancy, and in common, as well as real estates. They cannot indeed be vested in coparcenary ; because they do not descend from the ancestor to the heir, which is necessary to constitute coparceners. But if a horse, or other personal chattel, be given to two or more, absolutely, they are joint-tenants hereof ; and, unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements. And, in like manner, if the jointure be severed, as, by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common, without any *jus accrescendi* or survivorship. So, also, if 100*l.* be given by will to two or more, *equally to be divided* between them, this makes them tenants in common ; as, we have formerly seen, the same words would have done in regard to real estates. But, for the encouragement of husbandry and trade, it is held that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common and not as joint property, and there shall be no survivorship therein.⁸

⁸ Joint ownership is not so much favored in the law as formerly, and the tendency of legislation, in modern times, is to do away with the incident of survivorship appurtenant to such ownership, or to turn it into ownership in common, unless there be a positive expression of intention in the transfer of the property, that the interest shall be joint. A mere limitation of the property to two or more persons would, therefore, be held to create an ownership in common, instead of, as formerly, a joint ownership. But in the case of legacies limited to several persons, or where persons are appointed co-executors or co-trustees, the former rule still prevails, and the interest is generally deemed to be joint. The change in the law has been effected, because the doctrine of survivorship is an inconvenient clog to the transmission and disposal of property; but, in the case of executors or trustees, this doctrine is deemed salutary and advantageous, since it is desirable that those who survive should continue in the discharge of the duty or trust devolving upon them, rather than that others should interfere in the management of the property.

All kinds of personal property may be held in joint ownership or ownership in common ; as, *e. g.*, corporate stocks, a promissory note, a legacy, a patent right, a lease for years, or other *choses* in action, as well as tangible property in possession, as a horse, furniture, etc.

A joint owner or owner in common may freely dispose of his interest, and

CHAPTER XXV.

[BL. COMM.—BOOK II. CH. XXVI.]

Of Title to Things Personal by Occupancy.

WE are next to consider the *title* to things personal, or the various means of *acquiring*, and of *losing*, such property as may be had therein: both which considerations of gain and loss shall be blended together in one and the same view, as was done in our observations upon real property; since it is for the most part impossible to contemplate the one, without contemplating the other also. And these methods of acquisition or loss are principally twelve:—1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By custom. 5. By succession. 6. By marriage. 7. By judgment. 8. By gift or grant. 9. By contract. 10. By bankruptcy. 11. By testament. 12. By administration.

And, first, a property in goods and chattels may be acquired by *occupancy*: which, we have more than once remarked, was the original and only primitive method of acquiring any property at all; but which has since been restrained and abridged, by the positive laws of society, in order to maintain peace and harmony among mankind. For this purpose, by the laws of England, the person to whom it is transferred becomes owner in common with the other owners. Either one of such owners is entitled to the possession of the property, and the possession of one is deemed to be the possession of all. When injuries are committed, involving an interference with the right of possession, as, *e. g.*, trespass to the chattels or conversion of them, it is a general rule that all the owners must unite in an action against the wrong-doer. One co-owner may sue another for a destruction or spoliation of the chattel, and, in some States, for a sale of more than his own share. There is no form of proceeding at common-law to obtain a partition of the property held in common, but courts of equity will sometimes decree a division to be made. If the property is of the same quality, and severable in its nature, any owner may sever his own share, if it be ascertainable by weight or measurement. But when the property is not severable, as a horse, partition can only be effected at law, by obtaining the consent of the owners to a sale and a division of the proceeds. (See *Davis v. Lottich*, 46 N. Y. 393; *Benedict v. Howard*, 31 Barb. 569; *Tripp v. Riley*, 15 Barb. 333; *Tinney v. Stebbins*, 28 Barb. 290; also 146 Mass. 329; 14 R. I. 632; 126 Mass. 480; 77 N. Y. 158; 115 U. S. 482.)

gifts, and contracts, testaments, legacies, and administrations, have been introduced and countenanced, in order to transfer and continue that property and possession in things personal, which has once been acquired by the owner. And, where such *things are found without any other owner, they for the most [*401 part belong to the king by virtue of his prerogative; except in some few instances, wherein the original and natural right of occupancy is still permitted to subsist, and which we are now to consider.

1. Thus, in the first place, it hath been said, that any body may seize to his own use such goods as belong to an alien enemy. For such enemies, not being looked upon as members of our society, are not entitled during their state of enmity to the benefit or protection of the laws; and therefore every man that has opportunity is permitted to seize upon their chattels, without being compelled, as in other cases, to make restitution or satisfaction to the owner. But this, however generally laid down by some of our writers, must in reason and justice be restrained to such captors as are authorized by the public authority of the state, residing in the crown; and to such goods as are brought into this country by an alien enemy, after a declaration of war, without a safe-conduct or passport. And therefore it hath been holden, that where a foreigner is resident in England and afterwards a war breaks out between his country and ours, his goods are not liable to be seized. It hath also been adjudged, that if any enemy take the goods of an Englishman, which are afterwards retaken by another subject of this kingdom, the former owner shall lose his property therein, and it shall be indefeasibly vested in the second taker; unless they were retaken the same day, and the owner before sunset puts in his claim of property. Which is agreeable to the law of nations, as understood in the time of Grotius, even with regard to captures made at sea; which were held to be the property of the captors after a possession of twenty-four hours; though the modern authorities require that before the property can *be changed, the goods must have been [*402 brought into port, and have continued a night *intra præsidia* in a place of safe custody, so that all hope of recovering them was lost.¹

¹ But now it is necessary, both by the law of England and of the United States, that, in order to vest the property of a capture in the captors, a legal sentence of condemnation should be passed by a prize court.

And, as in the goods of an enemy, so also in his *person*, a man may acquire a sort of qualified property, by taking him a prisoner in war ; at least till his ransom be paid. And this doctrine seems to have been extended to negro-servants who are purchased, when captives, of the nations with whom they are at war, and are therefore supposed to continue in some degree the property of the masters who buy them : though accurately that property (if it indeed continues), consists, rather in the perpetual *service*, than in the *body* or *person* of the captives.

2. Thus, again, whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor ; and, as such, are returned into the common stock and mass of things : and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless they fall within the description of waifs, or estrays, or wreck, or hidden treasure ; for these, are vested by law in the king, and form a part of the ordinary revenue of the crown.

3. Thus too the benefit of the elements, the light, the air, and the water, can only be appropriated by occupancy.² If I have an ancient window overlooking my neighbor's ground, he may not erect any blind to obstruct the light : but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall : for there the first occupancy is rather in *403] him, than in me. If my neighbor *makes a tan-yard, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy ; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue.³ If a stream be unoccupied, I may erect a mill thereon, and detain the water ; yet not so as to injure my neighbor's prior mill, or his meadow : for he hath by the first occupancy acquired a property in the current.

4. With regard likewise to animals *feræ naturæ*, all mankind

² Rights to light and air are rather of the nature of real property, than of a personal nature. It has already been stated, that the doctrine of "ancient lights" is commonly rejected in this country. (See *ante*, pp. 232, 516.)

³ "It used to be thought that, if a man knew there was a nuisance, and went and lived near it, he could not recover, because, it was said, it is he that goes to the nuisance, and not the nuisance to him. That, however, is not the law now." (*Hole v. Barlow*, 4 C. B. [N.S.] 336.)

had by the original grant of the Creator a right to pursue and take any fowl or insect of the air, any fish or inhabitants of the waters, and any beast or reptile of the field : and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country. And when a man has once so seized them, they become while living his *qualified* property, or if dead, are *absolutely* his own : so that to steal them, or otherwise invade this property, is, according to their respective values, sometimes a criminal offence, sometimes only a civil injury. The restrictions which are laid upon this right, by the laws of England, relate principally to royal fish, as whale and sturgeon, and such terrestrial, ærial, or aquatic animals as go under the denomination of *game* ; the taking of which is made the exclusive right of the prince, and such of his subjects to whom he has granted the same royal privilege. But those animals which are not expressly so reserved, are still liable to be taken and appropriated by any of the king's subjects, upon their own territories ; in the same manner as they might have taken even game itself, till these civil prohibitions were issued : there being in nature no distinction between one species of wild animal and another, between the right of acquiring property in a hare or a squirrel, in a partridge or a butterfly : but the difference, at present made, arises merely from the positive municipal law.

5. To this principle of occupancy also must be referred the method of acquiring a special personal property in corn growing on the ground, or other *emblems* by any *possessor** of [*404 the land who hath sown or planted it, whether he be the owner of the inheritance, or of a less estate : which emblems are distinct from the real estate in the land, and subject to many though not all, the incidents attending personal chattels. They were devisable by testament before the statute of wills, and at the death of the owner shall vest in his executor and not his heir ; they are forfeitable by outlawry in a personal action ; and by the statute 11 Geo. II., ch. 19, though not by the common law, they may be distrained for rent arriere. The reason for admitting the acquisition of this special property, by tenants who have temporary interests, was formerly given ; and it was extended to tenants in fee, principally for the benefit of their creditors : and therefore, though the emblems are assets in the hands of the executor, are forfeitable upon outlawry, and dis-

trainable for rent, they are not in other respects considered as personal chattels; and particularly they are not the object of larceny before they are severed from the ground.

6. The doctrine of property arising from *accession* is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement; but if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials which he had so converted. And these doctrines are implicitly copied and adopted by our Bracton, and have since been *405] *confirmed by many resolutions of the courts. It hath even been held, that if one takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman.⁴

7. But in the case of *confusion* of goods, where those of two persons are so intermixed that the several portions can be no longer distinguished, the English law partly agrees with, and

⁴ Where an article is delivered to a mechanic to be repaired, the property in it, together with the accessorial additions, remains in the owner, though the labor and materials used in the repairs render its value much greater than when delivered to the mechanic. (*Gregory v. Stryker*, 2 Denio, 628.) So the owner of timber wrongfully taken and manufactured into shingles, may recover its value in its manufactured state as shingles. (*Rice v. Hollenbeck*, 19 Barb. 664; see 10 Allen, 518; 32 Me. 404; 37 Mich. 332.)

It has been held in New York that the rule stated in the text, in regard to the change of ownership, when the thing is altered into a different species, only applies when the alteration is made by a person acting innocently, without knowledge of the real title; as, for instance, a purchaser from a thief, who acts in the belief that the thief is the true owner of the goods. But if a wilful wrong-doer takes the property of another, and converts it into a different species, as by changing corn into whisky, the ownership is not changed, and the original owner may claim the new product or recover its value. (*Silisbury v. McCoon*, 3 N. Y. 379; see also *Brown v. Sax*, 7 Cow. 95; *Tuttle v. White*, 46 Mich. 285; *Hyde v. Cookson*, 21 Barb. 92; *Railroad Co. v. Hutchins*, 37 O. St. 282; *Gates v. Boom Co.*, 70 Mich. 309.)

partly differs from, the civil. If the intermixture be by consent, I apprehend that in both laws the proprietors have an interest in common, in proportion to their respective shares. But if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting-pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavored to be rendered uncertain without his own consent.⁶

8. There is still another species of property, which (if it subsists by the common law) being grounded on labor and invention, is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr Locke, and many others, to be founded on the personal labor of the occupant. And this is the right, which an author may be supposed to have in his own original literary composition: so that no other person without his leave may publish or make profit of the copies. When a man by the exertion of his rational powers has produced an original work, he seems to have clearly a *right to dispose of that identical work as he pleases, [*406 and any attempt to vary the disposition he has made of it, appears to be an invasion of that right. Now the identity of a literary composition consists entirely in the *sentiment* and the *language*; the same conceptions, clothed in the same words, must necessarily be the same composition: and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of

⁶ But in order that the person causing the admixture shall lose his title to his own goods in favor of the innocent party, it is necessary that such admixture be wilful and fraudulent, and that the shares or portions belonging respectively to each shall be incapable of being distinguished. Thus, if hats of the same style and shape, belonging to two dealers, were wrongfully intermixed by one of them, but were so marked that those of each owner could be readily assorted, there would be no change of title. (11 Metc. 493; 93 U. S. 575; 30 Me. 237; 21 Pick. 298; 30 N. J. Eq. 291; 9 Barb. 440.) If the intermixture be made innocently, or by accident, or by consent, it creates an ownership in common, each owner's interest being proportionate to his respective share. (See *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Nowlen v. Colt*, 6 Hill, 461; *Moore v. Erie R. Co.*, 7 Lansing, 39; also 58 Vt. 468; 61 Ia. 648.)

copies, or at any period of time, it is always the identical work of the author which is so exhibited ; and no other man (it hath been thought) can have a right to exhibit it, especially for profit, without the author's consent. This consent may perhaps be tacitly given to all mankind, when an author suffers his work to be published by another hand, without any claim or reserve of right, and without stamping on it any marks of ownership ; it being then a present to the public, like building a church or bridge, or laying out a new highway ; but, in case the author sells a single book, or totally grants the copyright, it hath been supposed, in the one case, that the buyer hath no more right to multiply copies of that book for sale, than he hath to imitate for the like purpose the ticket which is bought for admission to an opera or a concert ; and that, in the other, the whole property, with all its exclusive rights, is perpetually transferred to the grantee. On the other hand it is urged, that though the exclusive property of the manuscript, and all which it contains, undoubtedly belongs to the author, *before* it is printed or published ; yet, from the instant of publication, the exclusive right of an author or his assigns to the sole communication of his ideas immediately vanishes and evaporates ; as being a right of too subtile and unsubstantial a nature to become the subject of property at the common law, and only capable of being guarded by positive statutes and special provisions of the magistrate.⁶

⁶ The right of literary property, as it is termed, which an author has in his unpublished manuscripts, is one which exists and is protected by the common-law ; and this common-law jurisdiction has not been done away with by modern statutes of copyright. The author has a remedy, both in law and equity, against one, who surreptitiously or otherwise, obtains possession of his manuscripts, and attempts to publish them or circulate copies or reprints. The right protected, in such cases, is that of ownership in the ideas and expressions, as being the embodiment of thought in a particular form, rather than in the manuscripts considered as tangible property. Ownership of the ideas may even be severed from ownership of the manuscript. Thus, it has been held that letters considered merely as documents belong to the receiver ; but the writer has still a right of property in the contents, and power to control publication, unless publication be necessary for the protection of character. (See *Eyre v. Higbee*, 35 Barb. 502.) In like manner, an artist has an exclusive right of property in a painting executed by him, and other persons will be prohibited from issuing copies thereof. (*Oertel v Wood*, 40 How. Pr. 10.) Oral lectures will be protected as well as written ones, since they consist of thoughts expressed in a form of language, which is sufficient to give a right of property. (12 App. Cas. 326.) The author's right to the protection of

The Roman law adjudged, that if one man wrote anything on the paper or parchment of another, the writing should belong to the owner of the blank materials; meaning thereby the mechanical operation of writing, for which it directs the *scribe to [*407 receive a satisfaction; for in works of genius and invention, as in painting on another man's canvas, the same law gave the canvas to the painter. As to any other property in the works of the understanding, the law is silent; though the sale of literary copies, for the purposes of recital or multiplication, is certainly as ancient as the times of Terence, Martial, and Statius. Neither with us in England hath there been (till very lately) any final determination upon the right of authors at the common law.

But whatever inherent copyright might have been supposed to his compositions may be lost by a dedication of them to the public, either express or implied; as, by the publication and general circulation of a work not copyrighted. So it has been held that if a dramatic work be represented upon the stage to an indiscriminate audience, any one who hears it may act upon the stage whatever he may remember, and this will not be deemed a violation of the author's rights. But he cannot copy the drama, while being represented, or take notes of the contents, but must rely solely upon his remembrance. But this doctrine as to the right to reproduce from memory has been much criticised, and is denied in recent decisions. (See *Keene v. Wheatly*, 9 Am. Law Reg. 33; *Palmer v. De Witt*, 47 N. Y. 532; *Keene v. Clarke*, 5 Rob. 38; *Tompkins v. Halleck*, 133 Mass. 32; *French v. Conolly*, 1 N. Y. Weekly Dig. 196; 43 N. J. Eq. 365.)

The object of statutes of copyright has been to give to an author the exclusive right to publish and circulate copies of his work for a certain period of time, to impose special penalties for infringement, and in various ways to supplement the methods and remedies of the common-law by others which may be, in certain cases, more feasible and advantageous. The statute of 8 Anne, referred to in the text, has been repealed, and the present English law is found in the acts 5 & 6 Vict., c. 45; 45 & 46 id., c. 40. By this it is provided, that, "the sole and exclusive liberty of printing, or otherwise multiplying copies" of any book (which word has in the act a very extensive signification) shall be reserved to the author and his representatives for the term of his natural life and ten years afterwards, or for the term of forty-two years, whichever is the longer period. This right is made subject to certain conditions, such as the presentation of a copy to the British Museum and to other libraries. The act also secures to musical and dramatic composers the sole right of performing their compositions, or representing their pieces, for the same term for which copyright is granted. (See Broom & Hadley's Comm., ii., 582.) In this country, a comprehensive copyright act, quite similar in its general scope to that of England, has been passed by Congress. (See U. S. Rev. St. §§ 4948-4972; 18 St. at Large, c. 301.) The period for which the copyright is granted is twenty-eight years, and at the expiration of this term, a renewal may be obtained for fourteen years more. (See 131 U. S. 123; 128 U. S. 617; 33 Fed. Rep. 381; 35 id. 661.)

subsist by the common law, the statute 8 Ann., ch. 19 (amended by stat. 15 Geo. III., ch. 53), hath now declared that the author and his assigns shall have the sole liberty of printing and reprinting his work for the term of fourteen years, *and no longer*, and hath also protected that property by additional penalties and forfeitures: directing farther, that if, at the end of that term, the author himself be living, the right shall then return to him for another term of the same duration: and a similar privilege is extended to the inventors of prints and engravings, for the term of eight-and-twenty years by the statutes 8 Geo. II., ch. 13, and 7 Geo. III., ch. 38, besides an action for damages, with double costs, by statute 17 Geo. III., ch. 57. All which parliamentary protections appear to have been suggested by the exception in the statute of monopolies, 21 Jac. I., ch. 3, which allows a royal *patent* of privilege to be granted for fourteen years to any inventor of a new manufacture, for the sole working or making of the same; by virtue whereof it is held, that a temporary property therein becomes vested in the king's patentee.⁷

⁷ For the present patent law of England, see the statutes 46 & 47 Vict., c. 57, 51 & 52 Vict., c. 50. In the United States, the subject of patents is regulated by Act of Congress (U. S. Rev. St., §§ 4883-4937; 18 St. at Large, c. 77), which provides that "any person who has invented or discovered any new or useful art, machine, manufacture, or composition of matter, or any new or useful improvement thereof," may obtain a patent therefor. Under this provision, a *process* is held patentable as being an "art," as well as the *machine* or means devised for using it. (*Telephone Cases*, 126 U. S. 533.) "A manufacturing process is clearly an art. Goodyear's patent was for a process, namely, the process of vulcanizing india-rubber by subjecting it to a high degree of heat, when mixed with sulphur and a mineral salt. A new process is usually the result of discovery, a machine of invention. One may discover a new and useful improvement in the process of dyeing, tanning, etc., irrespective of any particular form of machinery or mechanical device, and another may invent a labor-saving machine by which the operation or process may be performed, and each may be entitled to his patent." (*Tilghman v. Proctor*, 102 U. S. 722; *Cochrane v. Deener*, 94 U. S. 780.) So a new *product* or *manufacture* is patentable as well as a new process. (*Rubber Co. v. Goodyear*, 9 Wall. 788.) But a *principle* is not patentable. Thus in the case of Morse's telegraph, a claim under his patent of the exclusive right to the use of electro-magnetism as a motive power for making intelligible marks at a distance was held not sustainable. (*O'Reilly v. Morse*, 15 How. U. S. 62.) "It amounted to a claim to the exclusive use of one of the forces of nature for a particular purpose. It was not a claim of any particular machinery, nor a claim of any particular process for utilizing the power, but a claim of the power itself,—a claim put forward on the ground that the patentee was the first to discover that it *could* be thus employed." (*Tilghman v. Proctor*, 102 U. S. at p. 726.)

To be patentable, a machine, process, improvement, etc., must possess both novelty and utility (see *Seymour v. Osborne*, 11 Wall. 516; *Glue Co. v. Upton*, 97 U. S. 3), and must amount to an invention or discovery. (*Thompson v. Boisselier*, 114 U. S. 1.) If an alleged invention involves nothing beyond what is obvious to persons skilled in the art to which it relates, it is therefore not patentable, since it is not the product of the inventive faculties. (*Pearce v. Mulford*, 102 U. S. 112; *Slawson v. Grand St. R. Co.*, 107 U. S. 649.) That which simply requires ordinary mechanical skill may not be patented. (*Hollister v. Benedict Mfg. Co.*, 113 U. S. 59.) So the substitution of a known equivalent for one of the elements of a former structure is not patentable. (*Crouch v. Roemer*, 103 U. S. 797; *Morley Machine Co. v. Lancaster*, 129 U. S. 263.)

A patent, under United States Laws, is granted for seventeen years, and the statutes specify fully the method of procedure to obtain it. If it be procured by fraud, a suit may be brought by the United States against the patentee to set it aside as null and void. (*U. S. v. Bell Telephone Co.*, 128 U. S. 315.)

CHAPTER XXVI.

[BL. COMM.—BOOK II. CH. XXVII.]

Of Title by Prerogative and Forfeiture.

A SECOND method of acquiring property in personal chattels is by the *king's prerogative*: whereby a right may accrue either to the crown itself, or to such as claim under the title of the crown, as by the king's grant, or by prescription, which supposes an ancient grant.

Such, in the first place, are all *tributes, taxes and customs*, whether constitutionally inherent in the crown, as flowers of the prerogative and branches of the *census regalis* or ancient royal revenue, or whether they be occasionally created by authority of parliament; of both which species of revenue we treated largely in the former book. In these the king acquires and the subject loses a property, the instant they become due: if paid, they are a *chose* in possession; if unpaid, a *chose* in action. Hither also may be referred all forfeitures, fines, and amercements due to the king, which accrue by virtue of his ancient prerogative, or by particular modern statutes: which revenues created by statute do always assimilate, or take the same nature, with the ancient revenues; and may therefore be looked upon as arising from a kind of artificial or secondary prerogative. And, in either case the owner of a thing forfeited and the person fined or amerced, lose and part with the property of the forfeiture, fine, or amercement, the instant the king or his grantee acquires it.

* In these several methods of acquiring property by [*409 prerogative there is also this peculiar quality, that the king cannot have a *joint* property with any person in one entire chattel, or such a one as is not capable of division or separation; but where the titles of the king and a subject concur, the king shall have the whole: in like manner as the king cannot, either by grant or contract, become a joint-tenant of a chattel real with another person but by such grant or contract shall become entitled to the whole in severalty. Thus, if a horse be given

to the king and a private person, the king shall have the sole property: if a bond be made to the king and a subject, the king shall have the whole penalty; the debt or duty being one single chattel; and so if two persons have the property of a horse between them, or have a joint debt owing them on bond, and one of them assigns his part to the king, or is attainted, whereby his moiety is forfeited to the crown; the king shall have the entire horse, and entire debt. For, as it is not consistent with the dignity of the crown to be partner with a subject, so neither does the king ever lose his right in any instance; but where they interfere, his is always preferred to that of another person, from which two principles it is a necessary consequence, that the innocent though unfortunate partner must lose his share in both the debt and the horse, or in any other chattel in the same circumstances.

This doctrine has no opportunity to take place in certain other instances of title by prerogative, that remain to be mentioned; as the chattels thereby vested are originally and solely vested in the crown, without any transfer or derivative assignment either by deed or law from any former proprietor. Such is the acquisition of property in wreck, in treasure-trove, in waifs, in *410] estrays, in royal fish, in swans, and the *like; which are not *transferred* to the sovereign from any former owner, but are originally *inherent* in him by the rules of law, and are derived to particular subjects, as royal franchises, by his bounty. These are ascribed to him, partly upon the general principle of their being *bona vacantia*, and are vested in the king, as well to preserve the peace of the public, as in trust to employ them for the safety and ornament of the commonwealth.

There is also a kind of prerogative *copyright* subsisting in certain books, which is held to be vested in the crown upon different reasons. Thus, 1. The king, as the executive magistrate, has the right of promulgating to the people all acts of state and government. This gives him the exclusive privilege of printing, at his own press, or that of his grantees, all *acts of parliament, proclamations, and orders of council*. 2. As supreme head of the church, he hath a right to the publication of all *liturgies* and books of *divine service*. 3. He is also said to have a right by purchase to the copies of such *law books, grammars, and other compositions*, as were compiled or translated at the expense of the

crown. And upon these two last principles, combined, the exclusive right of printing the translation of the *Bible* is founded.

There still remains another species of prerogative property, founded upon a very different principle from any that have been mentioned before ; the property of such animals *feræ naturæ*, as are known by the denomination of *game*, with the right of pursuing, taking, and destroying them : which is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery. We have already shown, and indeed it cannot be denied, that by the law of nature every man, from the prince to the peasant, has an equal right of pursuing, and taking to his own use, all such creatures as are *feræ naturæ*, and therefore the property of nobody, but liable to be seized by the first occupant. But it follows from the very end and constitution of society, that this natural right, as well as many others belonging to man as an individual, may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of the community. This restriction may be either with respect to the *place* in which this right may or may not be exercised ; with respect to the *animals* that are the subject of this right ; or with respect to the *persons* allowed or forbidden to exercise it. And, in consequence of this authority, we find that the municipal laws of many nations have exerted such power of restraint ; have in general forbidden the entering on another man's grounds, for any cause, without the owner's leave ; have extended their protection to such particular animals as are usually the objects of pursuit ; and have invested the prerogative of hunting and taking such animals in the sovereign of the state only, and such as he shall authorize.¹

* III. I proceed now to a third method, whereby a title [*420 to goods and chattels may be acquired and lost, *viz.* by *forfeiture* as a punishment of some crime or misdemeanor in the party

The succeeding portions of this chapter which treat of the English game laws are here omitted, as being of little importance to the American student. These laws were revised in 1831, by statute 1 & 2 Wm. IV., ch. 32, which allowed any person, who purchased a certificate or license, to kill game upon his own land, or on the land of any other person with his permission.

In this country, laws have been passed in a number of the States, prohibiting the killing of game at certain seasons of the year ; but statutes similar to the former English game laws, discriminating in favor of particular classes of persons in regard to the right to kill game, are nowhere in force. (See *Sterling v. Jackson*, 69 Mich. 488.)

forfeiting, and as a compensation for the offence and injury committed against him to whom they are forfeited. Of forfeitures, considered as the means whereby *real* property might be lost and acquired, we treated in a former chapter. It remains therefore in this place only to mention by what means or for what offences, goods and chattels become liable to forfeiture.

In the variety of penal laws with which the subject is at present encumbered, it were a tedious and impracticable task to reckon up the various forfeitures inflicted by special statutes, for particular crimes and misdemeanors; some of which are *mala in se*, or offences against the divine law, either natural or revealed; but by far the greatest part are *mala prohibita*, or such as derive their guilt merely from their prohibition by the laws of the land: such as is the forfeiture of 40s. per month by the statute 5 Eliz., ch. 4, for exercising a trade without having served seven years as an apprentice thereto; and the forfeiture of 10*l.* by 9 Ann., ch. 23, for printing an almanac without a stamp. I shall therefore confine myself to those offences only, by which *all* the goods and chattels of the offender are forfeited: referring the student for such, where pecuniary mulcts of different quantities are inflicted, to their several proper heads under which very many of them have been or will be mentioned, or else to the collections of Hawkins, and Burn, and other laborious compilers. Indeed, as most of these forfeitures belong to the crown, they may seem as if they ought to have been referred to the preceding method of acquiring personal property, namely, by prerogative. But as, in the instance of partial forfeitures, a moiety often goes to the informer, the poor, or sometimes to other persons; and as one total forfeiture, namely, that by a bankrupt who is guilty of felony *421] by *concealing his effects, accrues entirely to his creditors, I have therefore made it a distinct head of transferring property.

Goods and chattels then are totally forfeited by conviction of *high treason* or *misprision* of treason; of *petit treason*; of *felony* in general, and particularly of *felony de se*, and of *manslaughter*; nay, even by conviction of *excusable homicide*; by *outlawry* for treason or felony; by conviction of *petit larceny*; by *flight*, in treason or felony, even though the party be acquitted of the fact; by *standing mute*, when arraigned of *felony*; by *drawing a weapon on a judge*, or *striking any one in the presence of the*

king's courts ; by *præmunire* ; by *pretended prophecies*, upon a second conviction ; by *owling* ; by the *residing abroad* of artificers ; and by *challenging to fight* on account of money won at gaming.² All these offences, as will more fully appear in the fourth book of these Commentaries, induce a total forfeiture of goods and chattels.

And this forfeiture commences from the time of *conviction*, not the time of committing the fact, as in forfeitures of real property. For chattels are of so vague and fluctuating a nature, that to affect them by any relation back, would be attended with more inconvenience than in the case of landed estates : and part, if not the whole of them, must be expended in maintaining the delinquent, between the time of committing the fact and his conviction. Yet a fraudulent conveyance of them, to defeat the interest of the crown, is made void by statute 13 Eliz., ch. 5.

CHAPTER XXVII.

[BL. COMM.—BOOK II. CH. XXVIII.]

Of Title by Custom.

A FOURTH method of acquiring property in things personal, or chattels, is by *custom* : whereby a right vests in some particular persons, either by the local usage of some particular place, or by the almost general and universal usage of the kingdom. It were endless should I attempt to enumerate all the several kinds of special customs, which may entitle a man to a chattel interest in different parts of the kingdom ; I shall therefore content myself with making some observations on three sorts of customary interests, which obtain pretty generally throughout most parts of the nation, and are therefore of more universal concern ; viz : *heriots, mortuaries* and *heir-looms*.¹

² Forfeiture for crime is now abolished, except in the case of outlawry (33 & 34 Vict., ch. 23 [1870].)

¹ The matter in this chapter relating to heriots and mortuaries is here omitted, since these are subjects peculiar to English law. The doctrine of heir-looms is also confined to English law, unless title-deeds are to be

1. (3.) Heir-looms are such goods and personal chattels, as, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor. The termination, *loom*, is of Saxon original; in which language it signifies a limb or member; so that an heir-loom is nothing else but a limb or member of the inheritance. They are generally such things as cannot be taken away without damaging or dismembering the freehold: otherwise the general rule is, that no chattel interest whatsoever shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, *428] but shall vest in the executor. But deer in a real *authorized park, fishes in a pond, doves in a dovehouse, &c., though in themselves personal chattels, yet they are so annexed to and so necessary to the well-being of the inheritance, that they shall accompany the land wherever it vests, by either descent or purchase. For this reason also I apprehend it is, that the ancient jewels of the crown are held to be heir-looms; for they are necessary to maintain the state, and support the dignity, of the sovereign for the time being. *Charters* likewise, and deeds, court-rolls, and other evidences of the land, together with the chests in which they are contained, shall pass together with the land to the heir, in the nature of heir-looms, and shall not go to the executor. By special custom also, in some places, carriages, utensils, and other household implements, may be heir-looms; but such custom must be strictly proved. On the other hand, by almost general custom, whatever is strongly affixed to the freehold or inheritance, and cannot be severed from thence without violence or damage, "*quod ab ædibus non facile revellitur*," is become a member of the inheritance, and shall thereupon pass to the heir; as chimney-pieces, pumps, old fixed or dormant tables, benches, and the like.² A very similar notion to which prevails in the duchy of Brabant; where they rank certain things movable among those of the immovable kind, calling them by a very particular appellation, *prædia volantia*, or deemed in this country as coming within this designation; but this is a question yet unsettled. This subject is regarded, however, of sufficient historical interest to be retained.

² Though articles firmly attached to the freehold were formerly described as heir-looms, as stated in the text, they are now considered as included within the category of "fixtures," and as passing to the heir by virtue of the rules relating to this subject. See *ante*, p. 223, note 10.

volatile estates ; such as beds, tables, and other heavy implements of furniture.

Other personal chattels there are, which also descend to the heir in the nature of heir-looms, as a monument or tombstone in a church, or the coat-armor of his ancestor there *hung [*429 up, with the pennons and other ensigns of honor, suited to his degree. In this case, albeit the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson or any other take them away or deface them, but is liable to an action from the heir. Pews in the church are somewhat of the same nature, which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir.³ But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes ; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried.⁴ The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it ; and if any one in taking up a dead body steals the shroud or other apparel, it will be felony ; for the property thereof remains in the executor, or whoever was at the charge of the funeral.

³ The interest of a pewholder is generally held in this country to be in the nature of an easement, and therefore real property, though in some States it is provided by statute that it shall be deemed personal estate. This easement consists in the right to occupy the pew upon occasions of public worship, but the pew-owner has no legal interest in the church edifice. (*Abernethy v. Church of the Puritans*, 3 Daly, 1.) And his right is subject to the power of the trustees to make an alteration or enlargement in the church, and thereby change the relative position of the pew, or otherwise affect its convenience in use. But if the pew be unnecessarily destroyed by such changes, he will be entitled to a reasonable and adequate compensation. (See *Voorhees v. Presbyterian Church*, 8 Barb. 135; *Cooper v. Presbyterian Church*, 32 id. 222; *Sohier v. Trinity Church*, 109 Mass. 1; *Jones v. Towne*, 58 N. H. 462; also 13 Abb. N. C. 91; 59 Me. 245.)

⁴ But it was determined at common-law, that the stealing of dead bodies, though for purposes of dissection, was an indictable offence as a misdemeanor, "it being considered a practice contrary to common decency, and shocking to the general sentiments and feelings of mankind." And in this country, statutes have been passed in a number of the States declaring such an act criminal and punishable with heavy penalties. (See N. Y. Penal Code, §§ 305-315.) There is no right of property in a dead body. (23 So. Car. 25; see 14 Amer. Law Rev. 57.) Some States, however, recognize a *quasi* property as vested in the next of kin. (10 R. I. 227; 42 Pa. St. 293; 4 Bradf. 503; 130 Mass. 422.)

But to return to heir-looms; these, though they be mere chattels, yet cannot be devised away from the heir by will; but such a devise is void, even by a tenant in fee-simple. For though the owner might during his life have sold or disposed of them, as he might of the timber of the estate, since as the inheritance was his own, he might mangle or dismember it as he pleased; yet they being at his death instantly vested in the heir, the devise (which is subsequent and not to take effect till *after* his death) shall be postponed to the custom, whereby they have already descended.

CHAPTER XXVIII.

[BL. COMM.—BOOK II. CH. XXIX.]

Of Title by Succession, Marriage, and Judgment.

IN the present chapter we shall take into consideration three other species of title to goods and chattels.

V. The fifth method therefore of gaining a property in chattels, either personal or real, is by *succession*: which is, in strictness of law, only applicable to *corporations aggregate* of many, as dean and chapter, mayor and commonalty, master and fellows, and the like; in which one set of men may, by succeeding another set, acquire a property in all the goods, movables, and other chattels of the corporation. The true reason whereof is, because in judgment of law a corporation never dies: and therefore the predecessors, who lived a century ago, and their successors now in being, are one and the same body corporate. Which identity is a property so inherent in the nature of a body politic, that, even when it is meant to give any thing to be taken in succession by such a body, that succession need not be expressed: but the law will of itself imply it. So that a gift to such a corporation, either of lands or of chattels, without naming their successors, vests an absolute property in them so long as the corporation subsists. And thus a lease for years, an *431] *obligation, a jewel, a flock of sheep, or other chattel interest, will vest in the successors, by succession, as well as in the identical members to whom it was originally given.

But, with regard to sole corporations, a considerable distinction must be made. For if such sole corporation be the representative of a number of persons ; as the master of a hospital, who is a corporation for the benefit of the poor brethren ; an abbot, or prior, by the old law before the Reformation, who represented the whole convent ; or the dean of some ancient cathedral, who stands in the place of and represents, in his corporate capacity, the chapter ; such sole corporations as these have, in this respect, the same powers as corporations aggregate have, to take personal property or chattels in succession. And therefore a bond to such a master, abbot, or dean, and his successors, is good in law, and the successor shall have the advantage of it, for the benefit of the aggregate society, of which he is in law the representative. Whereas in the case of sole corporations, which represent no others but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession : and therefore, if a lease for years be made to the bishop of Oxford and his successors, in such case his executors or administrators, and not his successors, shall have it. For the word *successors*, when applied to a person in his political capacity, is equivalent to the word *heirs* in his natural ; and as such a lease for years, if made to John and his heirs, would not vest in his heirs but his executors ; so if it be made to John bishop of Oxford and his successors, who are the heirs of his body politic, it shall still vest in his executors and not in such his successors. The reason of this is obvious : for besides that the law looks upon goods and chattels as of too low and perishable a nature to be limited either to heirs, or such successors as are equivalent to heirs ; it would also follow, that if any such chattel interest (granted to a sole corporation and his successors) were allowed to descend to such successor, the property thereof must be in abeyance from the *death of [*432 the present owner until the successor be appointed : and this is contrary to the nature of a chattel interest, which can never be in abeyance or without an owner ; but a man's right therein, when once suspended, is gone for ever. This is not the case in corporations aggregate, where the right is never in suspense ; nor in the other sole corporations before mentioned, who are rather to be considered as heads of an aggregate body, than subsisting merely in their own right ; the chattel interest therefore, in such a case, is really and substantially vested in the hospital.

convent, chapter, or other aggregate body ; though the head is the visible person in whose name every act is carried on, and in whom every interest is therefore said (in point of form) to vest. But the general rule, with regard to corporations merely sole, is this, that no chattel can go to or be acquired by them in right of succession.

Yet to this rule there are two exceptions. One in the case of the king, in whom a chattel may vest by a grant of it formerly made to a preceding king and his successors. The other exception is, where, by a *particular* custom, some *particular* corporations sole have acquired a power of taking *particular* chattel interests in succession. And this custom, being against the general tenor of the common law, must be strictly interpreted, and not extended to any other chattel interests than such immemorial usage will strictly warrant. Thus the chamberlain of London, who is a corporation sole, may by the custom of London take *bonds* and *recognizances* to himself and his successors, for the benefit of the orphan's fund : but it will not follow from thence, that he has a capacity to take a *lease for years* to himself and his successors for the same purpose ; for the custom extends not to that : nor that he may take a *bond* to himself and his successors, for any other purpose than the benefit of the orphan's fund ; for that also is not warranted by the custom. Wherefore, upon the whole, we may close this head with laying down this general rule ; that such right of succession to chattels is *433] *universally inherent by the common law in all aggregate corporations, in the king, and in such single corporations as represent a number of persons ; and may, by special custom, belong to certain other sole corporations for some particular purposes ; although generally, in sole corporations, no such right can exist.

VI. A sixth method of acquiring property in goods and chattels is by *marriage* ; whereby those chattels, which belonged formerly to the wife, are by act of law vested in the husband with the same degree of property and with the same powers, as the wife, when sole, had over them.

This depends entirely on the notion of a unity of person between the husband and wife ; it being held that they are one person in law, so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incor-

porated in that of the husband. And hence it follows, that whatever personal property belonged to the wife, before marriage, is by marriage absolutely vested in the husband. In a *real* estate, he only gains a title to the rents and profits during coverture: for that, depending upon feudal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless, by the birth of a child, he becomes tenant for life by the curtesy. But, in *chattel interests*, the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he chooses to take possession of them: for, unless he reduces them to possession, by exercising some act of ownership upon them, no property vests in him, but they shall remain to the wife, or to her representatives, after the coverture is determined.¹

There is therefore a very considerable difference in the acquisition of this species of property by the husband, *ac- [*434 cording to the subject-matter; *viz*: whether it be a chattel *real* or chattel *personal*: and, of chattels personal, whether it be in *possession* or in *action* only. A *chattel real* vests in the husband, not absolutely, but *sub modo*. As, in case of a lease for years, the husband shall receive all the rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it during the coverture: if he be outlawed or attainted, it shall be forfeited to the king; it is liable to execution for his debts: and, if he survives his wife, it is to all intents and purposes his own. Yet, if he has made no disposition thereof in his lifetime, and dies before his wife, he cannot dispose of it by will: for, the husband having made no alteration in the property during his life, it never was transferred from the wife; but after his death she shall remain in her ancient possession, and it shall not go to his executors. So it is also of chattels personal (or *choses*) in *action*: as debts upon bond, contracts, and the like: these the husband may have if he pleases; that is, if he reduces them into possession by receiving or recovering them at law. And, upon such receipt or recovery they are absolutely and entirely his own; and shall go to his executors or administrators, or as he shall bequeath them by will, and shall not revest in the wife. But if he dies before

¹ In regard to the changes effected in these rules of the common-law by recent legislation, see *ante*, p. 154 note. But so far as unchanged by such statutes, these rules are still in force, both in England and in this country.

he has recovered or reduced them into possession, so that at his death they still continue *choses in action*, they shall survive to the wife ; for the husband never exerted the power he had of obtaining an exclusive property in them. And so, if an estray comes into the wife's franchise, and the husband seizes it, it is absolutely his property, but if he dies without seizing it, his executors are not now at liberty to seize it, but the wife or her heirs ; for the husband never exerted the right he had, which right determined with the coverture. Thus, in both these species of property the law is the same, in case the wife survives the husband ; but, in case the husband survives the wife, the law is very different with respect to *chattels real* and *choses in action*: for *435] he shall have *the *chattel real* by survivorship, but not the *chose in action* ; except in the case of arrears for rent, due to the wife before her coverture, which in case of her death are given to the husband by statute 32 Hen. VIII., ch. 37. And the reason for the general law is this : that the husband is in absolute possession of the *chattel real* during the coverture, by a kind of joint-tenancy with his wife ; wherefore the law will not wrest it out of his hands, and give it to her representatives ; though, in case he had died first, it would have survived to the wife, unless he thought proper in his lifetime to alter the possession. But a *chose in action* shall not survive to him, because he never was in possession of it at all, during the coverture ; and the only method he had to gain possession of it, was by suing in his wife's right ; but as, after her death he cannot (as husband) bring an action in her right, because they are no longer one and the same person in law, therefore he can never (as such) recover the possession. But he still will be entitled to be her administrator ; and may, in that capacity, recover such things in action as became due to her before or during the coverture.

Thus, and upon these reasons, stands the law between husband and wife, with regard to *chattels real* and *choses in action* ; but, as to *chattels personal*, (or *choses*) *in possession*, which the wife hath in her own right, as ready money, jewels, household goods, and the like, the husband hath therein an immediate and absolute property, devolved to him by the marriage, not only potentially but in fact, which never can again revest in the wife or her representatives.

And, as the husband may thus generally acquire a property

in all the personal substance of the wife, so in one particular instance the wife may acquire a property in some of her husband's goods : which shall remain to her after his death and not go to his executors. These are called her *paraphernalia* *which [*436 is a term borrowed from the civil law, and is derived from the Greek language, signifying something over and above her dower. Our law uses it to signify the apparel and ornaments of the wife, suitable to her rank and degree ; and therefore even the jewels of a peeress, usually worn by her, have been held to be *paraphernalia*. These she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferably to all other representatives. Neither can the husband devise by his will such ornaments and jewels of his wife ; though during his life perhaps he hath the power (if unkindly inclined to exert it) to sell them or give them away. But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons except creditors where there is a deficiency of assets. And her necessary apparel is protected even against the claim of creditors.²

VII. A judgment, in consequence of some suit or action in a court of justice, is frequently the means of vesting the right and property of chattel interests in the prevailing party. And here we must be careful to distinguish between property, the *right* of which is before vested in the party, and of which only *possession* is recovered by suit or action ; and property, to which a man before had no determinate title or certain claim, but he gains as well the right as the possession by the process and the judgment of the law. Of the former sort are all debts and *choses in action* : as if a man gives bond for £20, or agrees to buy a horse at a stated sum, or takes up goods of a tradesman upon an implied contract to pay as much as they are reasonably worth : in all these cases the right accrues to the creditor, and is completely vested in

² It is common to provide by statute in this country that, upon the husband's death, not only such articles of wearing apparel and ornament as were at common-law included in the wife's paraphernalia, shall be set apart for her use, to the exclusion of creditors' claims, but also various other articles of domestic use and convenience ; such as a reasonable amount of furniture, crockery, household utensils, family pictures, etc. The classes of articles thus set apart are specifically enumerated by the statutes of the several States. (As to paraphernalia, see 49 N. Y. 303.)

him, at the time of the bond being sealed, or the contract or agreement made ; and the law only gives him a remedy to recover the possession of that right, which already in justice be-
 *437] longs to him. * But there is also a species of property to which a man has not any claim or title whatsoever, till after suit commenced and judgment obtained in a court of law ; where the right and the remedy do not follow each other, as in common cases, but accrue at one and the same time : and where, before judgment had, no man can say that he has any absolute property, either in possession or in action. Of this nature are :—

I. Such penalties as are given by particular statutes, to be recovered on an action *popular* ; or, in other words, to be recovered by him or them that will sue for the same. Such as the penalty of £500, which those persons are by several acts of parliament made liable to forfeit, that being in particular offices or situations in life, neglect to take the oaths to the government : which penalty is given to him or them that will sue for the same. Now here it is clear that no particular person, A. or B., has any right, claim, or demand, in or upon this penal sum, till after action brought ; for he that brings his action, and can *bona fide* obtain judgment first, will undoubtedly secure a title to it, in exclusion of everybody else. He obtains an inchoate imperfect degree of property, by commencing his suit : but it is not consummated till judgment ; for, if any collusion appears, he loses the priority he had gained. But, otherwise, the right so attaches in the first informer, that the king (who before action brought may grant a pardon which shall be a bar to all the world) cannot after suit commenced remit any thing but his own part of the penalty. For by commencing the suit the informer has made the popular action his own private action, and it is not in the power of the crown, or of any thing but parliament, to release the informer's interest. This therefore is one instance, where a
 *438] suit and judgment at law are *not only the means of recovering, but also of acquiring, property. And what is said of this one penalty is equally true of all others, that are given thus at large to a common informer, or to any person that will sue for the same. They are placed, as it were, in a state of nature, accessible by all the king's subjects, but the acquired right of none of them ; open therefore to the first occupant, who declares his intention to possess them by bringing his action ;

and who carries that intention into execution, by obtaining judgment to recover them.

2. Another species of property, that is acquired and lost by suit and judgment at law, is that of *damages* given to a man by a jury, as a compensation and satisfaction for some injury sustained: as for a battery, for imprisonment, for slander, or for trespass. Here the plaintiff has no certain demand till after verdict; but, when the jury has assessed his damages, and judgment is given thereupon, whether they amount to twenty pounds or twenty shillings, he instantly acquires, and the defendant loses at the same time, a right to that specific sum. It is true, that this is not an acquisition so perfectly original as in the former instance: for here the injured party has unquestionably a vague and indeterminate right to some damages or other the instant he receives the injury; and the verdict of the jurors, and judgment of the court thereupon, do not in this case so properly vest a *new* title in him, as fix and ascertain the *old* one; they do not *give*, but *define*, the right. But, however, though strictly speaking, the primary right to a satisfaction for injuries is given by the law of nature, and the suit is only the means of ascertaining and recovering that satisfaction; yet, as the legal proceedings are the only visible means of this acquisition of property, we may fairly enough rank such damages, or satisfaction assessed, under the head of property acquired by suit and judgment at law.

*3. Hither also may be referred, upon the same prin- [*439
ciple, all title to costs and expenses of suit; which are often arbitrary, and rest entirely on the determination of the court, upon weighing all circumstances, both as to the *quantum*, and also (in the courts of equity especially, and upon motions in the courts of law) whether there shall be any costs at all. These costs, therefore, when given by the court to either party, may be looked upon as an acquisition made by the judgment of law.

CHAPTER XXIX.

[BL COMM.—BOOK II. CH. XXX.]

Of Title by Gift, Grant, and Contract.

WE are now to proceed, according to the order marked out, to the discussion of two remaining methods of acquiring a title to property in things personal, which are much connected together, and answer in some measure to the conveyances of real estates; being those by *gift* or *grant*, and by *contract*: whereof the former vests a property in *possession*, the latter a property in *action*.

VIII. Gifts then, or *grants*, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that *gifts* are always *gratuitous*, *grants* are upon some *consideration* or equivalent; and they may be divided, with regard to their subject-matter, into gifts or grants of chattels *real*, and gifts or grants of chattels *personal*. Under the head of gifts or grants of chattels *real*, may be included all leases for years of land, assignments, and surrenders of those leases; and all the other methods of conveying an estate less than freehold, which were considered in the twentieth chapter of the present book, and therefore need not be here again repeated: though these very seldom carry the outward appearance of a gift, however freely bestowed; being usually expressed to be made in consideration of blood, or natural affection, or of five or ten shillings nominally paid to the grantor; and in case of leases, always reserving a rent, though it be but a pepper-corn: any of which considerations will, in the eye of the law, convert the gift, if executed, into a grant; if not executed, into a contract.

***441]** *Grants or gifts, of chattels *personal*, are the act of transferring the right and the possession of them; whereby one man renounces, and another man immediately acquires, all title and interest therein; which may be done either in writing, or by word of mouth, attested by sufficient evidence, of which the delivery of possession is the strongest and most essential. But this conveyance, when merely voluntary, is somewhat suspicious;

and is usually construed to be fraudulent, if creditors or others become sufferers thereby. And, particularly, by statute 3 Hen. VII., ch. 4, all deeds of gift of goods, made in trust to the use of the donor, shall be void: because otherwise, persons might be tempted to commit treason or felony, without danger of forfeiture; and the creditors of the donor might also be defrauded of their rights. And by statute 13 Eliz., ch. 5, every grant or gift of chattels, as well as lands, with an intent to defraud creditors or others, shall be void as against such persons to whom such fraud would be prejudicial; but, as against the grantor himself, shall stand good and effectual; and all persons partakers in, or privy to, such fraudulent grants, shall forfeit the whole value of the goods, one moiety to the king, and another moiety to the party grieved; and also on conviction shall suffer imprisonment for half a year.†

A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately: as if A. gives to B. 100*l.*, or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it, though he did it without any consideration or recompense: unless it be prejudicial to creditors; or the donor were under any legal incapacity, as infancy, coverture, duress, or the like; or if he were drawn in, circumvented, or imposed upon, by false pretences, ebriety, or surprise. But if the gift does not take effect, by delivery of immediate possession, it is then not properly a gift, but a contract; *and [*442 this a man cannot be compelled to perform, but upon good and sufficient consideration as we shall see under our next division.¹

¹ Gifts are distinguished in law as of two classes: gifts *inter vivos*, or between living persons, and gifts *causa mortis*, or those made in apprehension of death. This classification is not perfectly precise in its use of terms, since all gifts in fact must be "between living persons;" and the real distinction must be understood to be that gifts *inter vivos* are those made by a donor not under apprehension of death, while gifts *causa mortis* are those made when such apprehension does exist, and by reason thereof. There are important differences in the rules applicable to these two classes of gifts, and they may therefore be referred to separately:—

I. Gifts *inter vivos*.—These gifts may be complete during the donor's lifetime, and, if properly effectuated by a valid delivery, are irrevocable by him. Such delivery may be either actual or constructive. It is actual, when the article given is actually transferred to the donee or placed in his possession; while such acts as giving to the donee the key of a warehouse or chest, in which

† See *ante*, p. 444, note 3.

IX. A contract, which usually conveys an interest merely in action, is thus defined: "an agreement upon sufficient consideration, to do or not to do a particular thing." From which definition there arise three points to be contemplated in all contracts: 1. The *agreement*; 2. The *consideration*; and 3. The *thing* to be done or omitted, or the different species of contracts.

First, then, it is an *agreement*, a mutual bargain or convention; and therefore there must at least be two contracting parties, of sufficient ability to make a contract; as where A. contracts the article is contained, or an order upon a bailee, which the latter accepts, would be instances of a constructive or symbolical delivery. (*Beaver v. Beaver*, 117 N. Y. 421; *Allen v. Cowan*, 23 N. Y. 502; see 55 Vt. 325; 18 N. H. 360; 25 Q. B. D. 57.) Valid *choses* in action or claims against third persons may be the subjects of gift, as well as tangible, corporeal articles. A transfer of the instrument or document evidencing such claim would be, in general, a sufficient delivery; as, *e. g.*, a gift of money deposited in a savings bank by delivery of the pass-book (36 Conn. 88; 129 Mass. 425; 63 Me. 364); the transfer of a bond and mortgage (*Hackney v. Vrooman*, 62 Barb. 650); or of certificates of stock (10 Bosw. 362; 50 Conn. 472; 35 N. J. Eq. 314). But there can be no valid gift of the donor's own promise, though it be expressed in writing, as in the form of a promissory note or check. (See 70 N. Y. 212.) If the sum payable upon such an instrument be collected, the gift becomes complete, but until then it is revocable at the donor's pleasure. It is, in effect, but a promise without consideration. Gifts *inter vivos* may be avoided because obtained by fraud practiced upon the donor, or because they impair or prejudice the just claims of creditors, or on account of the donor's legal incapacity by reason of infancy, insanity, duress, etc.

II. Gifts *causa mortis*.—These cannot become complete during the donor's lifetime, even though there be a valid delivery. The donor may revoke the gift at any time before his death, and a recovery from the existing illness or disorder operates of itself as a revocation; for such gifts depend impliedly upon the condition that they shall become effectual and complete only in the event of the donor's decease, since they are made only in apprehension of such a result. But in other respects the rules of law applicable to the two classes of gifts are substantially the same. There must be a delivery which may be either actual or constructive, and the same varieties of personal property may be the subject of gift. Thus, a bill of exchange, or promissory note, or certificate of deposit, or other valid security in the donor's favor, may be the subject of such a gift, whether indorsed by him or not; but as to a note or check drawn by the donor himself, the rule is otherwise. (*Baskett v. Haskell*, 107 U. S. 602; *Williams v. Guile*, 117 N. Y. 343; *Emery v. Clough*, 63 N. H. 552; *Coleman v. Parker*, 114 Mass. 30; *Bates v. Kempton*, 7 Gray, 382; see 31 Mich. 185; 36 N. Y. 340.) In some States it is held that a valid gift *inter vivos* may be made by a declaration of gift without actual delivery, if the thing to be given is then in the donee's possession, but that the rule is otherwise in the case of a gift *causa mortis*. (81 Me. 231; 14 R. I. 502.)

with B to pay him 100*l.*, and thereby transfers a property in such sum to B. Which property is however not in possession, but in action merely, and recoverable by suit at law ; wherefore it could not be transferred to another person by the strict rules of the ancient common law ; for no *chose* in action could be assigned or granted over, because it was thought to be a great encouragement to litigiousness, if a man were allowed to make over to a stranger his right of going to law. But this nicety is now disregarded : though, in compliance with the ancient principle, the form of assigning a *chose* in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession.² And therefore, when in common acceptation a debt or bond is said to be assigned over, it must still be sued in the original creditor's name ; the person to whom it is transferred being rather an attorney than an assignee. But the king is an exception to this general rule, for he might always either grant or receive a *chose* in action by assignment : and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a *chose* in action, as much as the law will that of a *chose* in possession.

* This contract or agreement may be either express or [*443 implied. *Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten loads of timber, or to pay a stated price for certain goods. *Implied* are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work ; the law implies that I undertook, or contracted to pay him as much as his labor deserves. If I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value. And there is also one species of implied contracts, which runs through and is annexed to all other contracts, conditions, and covenants, *viz.* that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal. In short, almost all the rights of personal property (when not in actual possession) do in great measure depend upon contracts, of one kind or another, or at least might be reduced un-

² See *ante*, p. 519, note 6.

der some of them : which indeed is the method taken by the civil law ; it having referred the greatest part of the duties and rights, which it treats of, to the head of obligations *ex contractu* and *quasi ex contractu*.

A contract may also be either *executed*, as if A. agrees to change horses with B., and they do it immediately ; in which case the possession and the right are transferred together : or it may be *executory*, as if they agree to change next week ; here the right only vests, and their reciprocal property in each other's horse is not in possession but in action ; for a contract *executed* (which differs nothing from a grant) conveys a *chose in possession*, a contract *executory* conveys only a *chose in action*.

Having thus shown the general nature of a contract, we are *secondly*, to proceed to the *consideration* upon which it is founded ; *444] or the reason which moves the contracting party to *enter into the contract. " It is an agreement, upon *sufficient consideration*." The civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal. This thing, which is the price or motive of the contract, we call the consideration : and it must be a thing lawful in itself, or else the contract is void. A *good* consideration, we have before seen, is that of blood or natural affection between near relations ; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one relation to another. This consideration may sometimes however be set aside, and the contract become void, when it tends in its consequences to defraud creditors, or other third persons, of their just rights. But a contract for any *valuable* consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law ; and, if it be of a sufficient adequate value, is never set aside in equity ; for the person contracted with has then given an equivalent in recompense, and is therefore as much an owner, or a creditor, as any other person.⁸

⁸ These statements need qualification ; for contracts, though made upon valuable consideration, may be avoided when characterized by actual fraud or illegality, may be set aside in equity on the ground of accident, or mistake of material facts, are unenforceable when the provisions of the Statute of Frauds are not complied with, etc. But it is a general rule that the adequacy or inadequacy of the consideration shall not be allowed to affect the validity of a contract ; and an onerous obligation, involving greatly disproportionate

These valuable considerations are divided by the civilians into four species. 1. *Do ut des* : as when I give money or goods, on a contract that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promise of repayment ; and all sales of goods, in which there is either an express contract to pay so much for them, or else the law implies a contract to pay so much as they are worth. 2. The second species is, *facio ut facias* ; as, when I agree with a man to do his work for him, if he will do mine for me ; or if two persons agree to marry together ; or to do any positive act on both sides. Or, it may be to forbear on one side on consideration of something done on the other, as, that in consideration A., the tenant, will repair his house, B., the landlord, will not sue him for waste. Or, it may be for mutual forbearance on both sides ; * as, that [*445 in consideration that A. will not trade to Lisbon, B. will not trade to Marseilles ; so as to avoid interfering with each other. 3. The third species of consideration is, *facio ut des* : when a man agrees to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value to it. And when a servant hires himself to his master for certain wages or an agreed sum of money : here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally ; for then he is under an implied contract to perform this service for what it shall be reasonably worth. 4. The fourth species is, *do ut facias* : which is the direct counterpart of the preceding. As when I agree with a servant to give him such wages upon his performing such work : which, we see, is nothing else but the last species inverted : for *servus facit, ut herus det, and herus dat, ut servus faciat*.

A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum* or agreement to do or pay any thing on one side, without any compensation on the other, is totally void in law ; and a man cannot be compelled to perform it.⁴ As if one man promises to give an- labor or expense, may depend upon a small consideration. If, however, the consideration be so trifling as to render the contract unconscionable, relief will generally be obtainable in equity. (*Hume v. U. S.*, 132 U. S. 406.)

⁴[This must be read as confined to simple contracts ; for no consideration is essential to the validity of a contract under seal, though in some cases creditors may treat voluntary deeds without consideration, as fraudulent and invalid. The leading rule with respect to consideration is, that *it must be*

other 100*l.*, here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however a man may or may not be bound to perform it in honor or conscience, which the municipal laws do not take upon them to decide; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted the maxim of the civil law, that *ex nudo pacto non oritur actio*. But any degree of reciprocity will prevent the pact from being nude: nay, even if the thing be founded on a prior moral obligation (as a promise to pay a just debt, though barred by the statute of limitations), it is no longer *nudum pactum*.⁵ And as this rule was principally established, to avoid the inconvenience that would arise from setting up mere *446] verbal promises, for which no good reason could * be assigned, it therefore does not hold in some cases, where such promise is authentically proved by written documents. For if a man enters into a voluntary bond, or gives a promissory note, he shall not

some benefit to the party by whom the promise is made, or to a third person at his instance, or some detriment sustained (at the instance of the party promising) *by the party in whose favor the promise is made*. A written agreement, *not under seal*, is *nudum pactum* without consideration; but a negotiable security, as a bill of exchange, or promissory note, carries with it *prima facie* evidence of consideration, which is binding in the hands of a third party to whom it has been negotiated, but may be inquired into between the immediate parties to the bill or note themselves. The consideration for a contract, as well as the promise for which it is given, must also be *legal*. Thus, a contract for the sale of obscene or libellous prints, or for the furtherance of immoral practices, or contrary to public policy, or in contravention of the statute law,—in all these cases the considerations are invalid, and the contracts void.] (See *Traphagen v. Voorhees*, 44 N. J. Eq. 21.)

⁵ But a prior moral obligation will not be a sufficient consideration to support a promise, unless it previously constituted a legal obligation, which has become unenforceable by reason of a positive rule of law. Thus, the Statute of Limitations bars suits upon simple contracts, after the lapse of a certain period, usually six years: if, therefore, this time has elapsed without an action being brought, the legal obligation to pay is changed into a moral obligation; and this will be sufficient consideration for a new promise made subsequently to discharge the obligation. So a promise to pay a debt discharged in bankruptcy, or contracted while the debtor was an infant, may be enforced on the same ground. But moral considerations of other kinds will not support a promise. Thus, a promise made by a father to pay the expense previously incurred in taking care of his adult son, who had suddenly been taken sick among strangers, was held not to be binding. (*Mills v. Wyman*, 3 Pick. 207; see 5 Johns. 272; 114 Pa. St. 358 & 496; 59 N. H. 407; 51 Mich. 121.)

be allowed to aver the want of a consideration in order to evade the payment : for every bond, from the solemnity of the instrument, and every note, from the subscription of the drawer, carries with it an internal evidence of a good consideration. Courts of justice will therefore support them both, as against the contractor himself ; but not to the prejudice of creditors, or strangers to the contract.⁶

We are next to consider, *thirdly*, the thing agreed to be done or omitted. "A contract is an agreement, upon sufficient consideration, *to do or not to do a particular thing*." The most usual contracts, whereby the right of chattels personal may be acquired in the laws of England, are, 1. That of *sale* or *exchange*. 2. That of *bailment*. 3. That of *hiring* and *borrowing*. 4. That of *debt*.

1. Sale, or *exchange*, is a transmutation of property from one man to another, in consideration of some price or recompense in value : for there is no sale without a recompense : there must be *quid pro quo*. If it be a commutation of goods for goods, it is more properly an *exchange* ; but if it be a transferring of goods for money, it is called a *sale* ; which is a method of exchange introduced for the convenience of mankind, by establishing a universal medium, which may be exchanged for all sorts of other property ; whereas if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjust the respective

⁶ Instruments under seal (as bonds) and negotiable paper, as promissory notes, bills of exchange, etc., constitute exceptions to the general rule, that the consideration must be something actually rendered or to be rendered, as the price of the promise, the *quid pro quo*, since in contracts of these kinds the existence of a consideration is presumed. In the case of bonds &c., the seal is said to be sufficient evidence of a consideration ; this is because it is deemed to evince sufficient deliberation to serve as a substitute for an actual consideration. In the case of negotiable paper, a consideration is only presumed to exist, when it is necessary to protect the rights of innocent third parties, into whose possession the paper has passed before maturity. The ground on which this doctrine rests is that of public policy, since it is desirable that commercial paper should circulate freely as the representative of money ; and, to secure this object, the interests of those who purchase in good faith must necessarily be protected. But between the immediate parties to negotiable paper, the consideration may always be inquired into. Thus, if the payee sues the maker, the want of consideration may be shown to bar his recovery ; but otherwise, if an indorsee sues. (See note 4, above.) But in some States a seal, in executory contracts, is only presumptive evidence of consideration, not conclusive. (N. Y. Code Civ. Pro. § 840.)

values, and the carriage would be intolerably cumbersome. All civilized nations adopted therefore very early the use of money; for we find Abraham giving "four hundred shekels of silver, current money with the merchant," for the field of Macpelah; though the practice of exchange still subsists among several of *447] the savage nations. But with regard to the *law* of *sales and exchanges, there is no difference. I shall therefore treat of them both under the denomination of sales only; and shall consider their force and effect, in the first place where the vendor *hath* in himself, and secondly where he *hath not*, the property of the thing sold.

Where the vendor *hath* in himself the property of the goods sold, he hath the liberty of disposing of them to whomsoever he pleases, at any time, and in any manner; unless judgment has been obtained against him for a debt or damages, and the writ of execution is actually delivered to the sheriff.⁷ For then, by the statute of frauds, the sale shall be looked upon as fraudulent, and the property of the goods shall be bound to answer the debt, from the time of delivering the writ. Formerly it was bound from the *teste*, or issuing of the writ, and any subsequent sale was fraudulent; but the law was thus altered in favor of *purchasers*, though it still remains the same between the *parties*; and therefore if a defendant dies after the awarding and before the delivery of the writ, his goods are bound by it in the hands of his executors.

If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed. And therefore, if the vendor says, the price of a beast is four pounds, and the vendee says he will give four pounds, the bargain is struck; and they neither of them are at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid, nor the goods delivered, nor tender

⁷ It is also the rule, in a number of the United States, that the goods of the debtor shall be bound from the time of the delivery of the writ of execution to the sheriff, but not so as to render subsequent sales necessarily fraudulent; the title of any purchaser in good faith after execution issued, but prior to an *actual levy* upon the property, being protected. Such is the rule in New York. (*Bond v. Willet*, 31 N. Y. 102; *Ray v. Birdseye*, 5 Den. 619; *Williams v. Shelly*, 37 N. Y. 375.) But, in some States, the goods are not bound until an actual levy.

made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases. But if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of *earnest* (which the civil law calls *arrha*, and interprets to be "*emptionis-venditionis contractæ argumentum*,"*) the property of the goods is [*448 absolutely bound by it; and the vendee may recover the goods by action, as well as the vendor may the price of them. And such regard does the law pay to earnest as an evidence of a contract, that, by the same statute 29 Car. II., ch. 3, no contract for the sale of goods, to the value of 10*l.* or more, shall be valid, unless the buyer actually receives part of the goods sold, by way of earnest on his part; unless he gives part of the price to the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party, or his agent, who is to be charged with the contract.⁵ And with regard to goods under the value of 10*l.* no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party, or his agent, who is to be charged therewith. Anciently, among all the Northern nations, shaking of hands was held necessary to bind the bargain; a custom which we still retain in many verbal contracts. A sale thus made was called *handsale*, "*venditio per mutuam manuum complexionem*;" till in process of time the same word was used to signify the price or earnest, which was given immediately after the shaking of hands, or instead thereof.

As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor;

⁵ This is known as the *Statute of Frauds*, and is an act of great importance. It has been substantially reënacted in the respective American States; but the value of the property sold, which shall be necessary to bring the contract within the terms of the statute, is fixed at different sums in different States. In New York and Massachusetts it is \$50, in Maine \$30, in Vermont \$40. But provisions in regard to the sale of goods of less value, similar to that stated in the text in regard to the sale in England of goods under the value of £10, are not usually found in statutes of frauds in this country. The principles of law which have been established in the interpretation and application of this statute, are much too extensive to admit of even a brief statement here. The student may consult such works as Parsons on Contracts, vol. iii. pp. 1-60; Benjamin on Sales; Browne on Statute of Frauds.

but the vendee cannot take the goods, until he tenders the price agreed on. But if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A. sells a horse to B. for 10*l.* and B. pays him earnest, or signs a note in writing of the bargain; and afterwards, before the delivery of the horse, or money paid, the horse dies in the vendor's custody, still he is entitled to the money, because, by *449] the *contract the property was in the vendee.⁹ Thus may property in goods be transferred by sale, where the vendor *hath* such property in himself.

But property may also in some cases be transferred by sale, though the vendor *hath none at all* in the goods; for it is expedient that the buyer, by taking proper precautions, may at all

⁹ "But in one particular instance, where the act of transfer is not completed, the right of property transferred by the sale to the vendee may be divested by an act of the vendor, this occurring when the vendor exercises that right conferred on him by the Law Merchant, which is termed the right of *stoppage in transitu*. For where the parties deal on credit, that is, when the contract is in fact for the immediate delivery of the goods, but for the future payment of the money, it may sometimes happen that before the delivery has been completed, the vendor may discover that the vendee is insolvent, and that he will consequently be unable to perform his part of the contract, when the time arrives for so doing; and the law, therefore, allows the vendor, if he can, to prevent the goods coming into the possession of the vendee. For, if he has not parted with the goods at all, he may retain them; but if they have already been put into the hands of some third party, as a carrier, for delivery, he may give notice to such party, who thereupon becomes bound to retain them; and, after notice, should he by mistake deliver them, the vendor may bring an action for them, even against the assignees of the vendee, if he have in the meantime become bankrupt. Nor will partial payment destroy this right; for the effect of the stoppage *in transitu* is not to rescind the contract, which cannot be done after part payment: its operation is to create an equitable lien on the goods, which may be retained until full payment be made, the vendee or his assigns being then entitled to the goods. This right of stoppage ceases entirely, and cannot be exercised, when the goods have come actually or constructively into the hands of the vendee; as if, after the goods have been sold, they remain in the vendor's warehouse, he receiving warehouse-rent for them. In such a case, the vendor holds the goods as the agent of the vendee, the delivery is considered complete, and the right of stoppage *in transitu* is gone."—(KERR.) (Consult, on this subject, *Becker v. Hallgarten*, 86 N. Y. 167; *Harris v. Pratt*, 17 N. Y. 249; *Allen v. Railroad Co.*, 79 Me. 327; also 135 Mass. 442; 63 N. H. 565.)

events be secure of his purchase ; otherwise all commerce between man and man must soon be at an end. And therefore the general rule of law is that all sales and contracts of anything vendible, in fairs or markets *overt* (that is, open,) shall not only be good between the parties, but also be binding on all those that have any right or property therein.¹⁰ And for this purpose, the Mirror informs us, were tolls established in markets, *viz.*, to testify the making of contracts ; for every private contract was discountenanced by law ; insomuch that our Saxon ancestors prohibited the sale of anything above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses. Market overt in the country is only held on the special days provided for particular towns by charter or prescription ; but in London every day, except Sunday, is market day. The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt ; but in London every shop in which goods are exposed publicly for sale, is market overt, for such things only as the owner professes to trade in. But if my goods are stolen from me, and sold, out of market overt, my property is not altered, and I may take them wherever I find them.¹¹ And it is expressly provided by statute,

¹⁰ The doctrine of the English law, in regard to sales in market overt, has no application in this country.

¹¹ It is a fundamental rule of the common-law, that an owner cannot be deprived of his title to property against his will. If, therefore, he be wrongfully dispossessed of his goods, the wrong-doer will acquire no valid title, and can convey none even to an honest purchaser ; for no one can convey a better title to property than he himself possesses. The owner may therefore retake his property wherever he can find it, if he can do so without causing a breach of the peace, or he may bring action for its recovery, or to obtain re-imbursement for its loss. A purchaser, therefore, is not protected, though he acquire the property for a fair and valuable consideration, in the usual course of trade, without notice of any conflicting claim, or of suspicious circumstances calculated to put him upon his guard. (*Soltan v. Gerdau*, 119 N. Y. 380 ; see 64 Cal. 388 ; 101 Mass. 344 ; 12 Gray, 141 ; 58 Md. 502.) But there are important exceptions to this general doctrine. Thus cash, bank-bills, and negotiable paper may be transferred by one having no title (as a thief), so as to convey a valid title to an honest purchaser in good faith. Moreover, if a person induce a sale of goods to himself by the owner by fraudulent misrepresentations, it is held that, though his own title is defeasible by reason of the fraud, he may, nevertheless, convey a valid title to a purchaser in good faith, without knowledge of defect of title. The owner, in such a case, is deemed to confer upon

1 Jac. I., ch. 21, that the sale of any goods wrongfully taken, to any pawnbroker in London, or within two miles thereof, shall not alter the property, for this, being usually a clandestine trade, is therefore made an exception to the general rule. And even in market overt, if the goods be the property of the king, such sale *450] (though regular in all other respects), * will in no case bind him ; though it binds infants, feme-coverts, idiots and lunatics, and men beyond sea or in prison : or if the goods be stolen from a common person, and then taken by the king's officer from the felon, and sold in open market ; still, if the owner has used due diligence in prosecuting the thief to conviction, he loses not his property in the goods. So likewise, if the buyer knoweth the property not to be in the seller ; or there be any other fraud in the transaction ; if he knoweth the seller to be an infant, or feme-covert not usually trading for herself ; if the sale be not originally and wholly made in the fair or market, or not at the usual hours ; the owner's property is not bound thereby. If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price ; unless the property had been previously altered by a former sale. And notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice. By which wise regulations the common law has secured the right of the proprietor in personal chattels from being divested, so far as was consistent with that other necessary policy, that purchasers, *bona fide*, in a fair, open, and regular manner, shall not be afterwards put to difficulties by reason of the previous knavery of the seller.

But there is one species of personal chattels, in which property is not easily altered by sale, without the express consent of the owner ; and those are horses. For a purchaser gains

the vendor the *indicia* of ownership and apparent power of disposal, since the property was taken from him not against his will, but by his consent, though this consent was fraudulently obtained ; and, therefore, the claims of the honest purchaser to the property are considered as superior to his own, and his only remedy is against the person guilty of the fraud. But if goods be obtained by fraudulent pretences without a sale, the rule is different. (*Collins v. Ralli*, 20 Hun, 246, 85 N. Y. 637 ; see 117 Mass. 23 ; 79 N. Y. 254 ; 105 Ind. 81 ; 92 Pa. St. 379 ; 37 O. St. 356.)

no property in a horse that has been stolen, unless it be bought in a fair or market overt, according to the direction of the statutes, 2 P. & M., ch. 7, and 31 Eliz., ch. 12. By which it is enacted that the horse shall be openly exposed, in the time of such fair or market, for one whole hour together, between ten in the morning and sunset, in the public place used for such sales, and not in any private yard or stable; and afterwards brought by both the vendor and vendee to the book-keeper of such fair or market; that toll be paid, if any * be due; and if not, one penny [*451 to the book-keeper, who shall enter down the price, color and marks of the horse, with the names, additions and abode of the vendee and vendor; the latter being properly attested. Nor shall such sale take away the property of the owner, if within six months after the horse is stolen he puts in his claim before some magistrate, where the horse shall be found; and within forty days more, proves such his property by the oath of two witnesses, and tenders to the person in possession such price as he *bona fide* paid for him in market overt. But in case any one of the points before-mentioned be not observed, such sale is utterly void; and the owner shall not lose his property, but at any distance of time may seize or bring an action for his horse, wherever he happens to find him.

By the civil law an implied warranty was annexed to every sale, in respect to the title of the vendor; and so, too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose. But with regard to the goodness of the wares so purchased, the vendor is not bound to answer: unless he expressly warrants them to be sound and good, or unless he knew them to be otherwise, and hath used any art to disguise them, or unless they turn out to be different from what he represented them to the buyer.¹²

¹² It is also the general rule in the United States, that, upon the sale of personal property by a vendor in possession, a warranty of *title* is implied. (91 N. Y. 193; 66 Wis. 124; 104 Mass. 42; 52 Me. 202.) But the present English rule is more narrow and restricted; and no warranty is generally implied, except in the case of a sale of goods in a shop, in the ordinary course of business.

But with regard to the *quality* of goods sold, the rule of the common-law is different. There is no implied warranty of quality, the maxim being *caveat emptor*, let the purchaser be on his guard. But this general principle

2. Bailment, from the French *bailler*, to deliver, is a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee. As

is subject to important qualifications, which have been well stated in the following propositions. (See *Jones v. Fust*, L. R. 3 Q. B. 202.)

1. Where goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies; the purchaser takes them at his risk, even though the defect which exists in them is latent, and not discoverable on examination, — at least, where the seller is neither the grower nor the manufacturer. The buyer, in such a case, has the opportunity of exercising his judgment upon the matter; and if the result of his inspection be unsatisfactory, or if he distrust his own judgment, he may, if he chooses, require an express warranty. In such a case, it is not an implied term of the contract of sale, that the goods are of any particular quality, or are merchantable. (*Parkinson v. Lee*, 2 East, 314.) [See 10 Wall. 383; 5 N. Y. 73. But some American courts hold it to be the duty of a vendor to disclose a purely latent defect of which he knows. (49 Vt. 297; 94 Mo. 423; 102 Mass. 132; 77 Me. 457; 89 Ill. 598; 58 Wis. 282.)]

2. Where there is a sale of a definite existing chattel, specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty as to quality. (*Barr v. Gibson*, 3 M. & W. 390.) [See 57 Md. 155; 126 Mass. 10; 34 N. Y. 118; 127 Ill. 457.]

3. Where a known, described, and defined article is ordered of a manufacturer, although stated to be required by the purchaser for a particular purpose, still if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. (*Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288.) [134 U. S. 306; 68 Pa. St. 149; 64 N. Y. 411; 58 Md. 59; 48 Vt. 83.]

4. Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, a warranty is inferred that the said article shall be reasonably fit for the purpose to which it is to be applied. In such a case, the buyer trusts to the manufacturer or dealer, and relies upon his judgment. (*Brown v. Edgington*, 2 M. & Gr. 279; *Jones v. Bright*, 5 Bing. 533.) [120 U. S. 630; 71 N. Y. 118; 95 Ind. 387; 51 Vt. 480; 77 Me. 457; 58 Vt. 543.]

5. Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had an opportunity of inspecting, it is an implied term in the contract that a merchantable article shall be supplied. (*Laing v. Fidgeon*, 4 Camp. 169; *Shepherd v. Pybus*, 3 M. & Gr. 868.) [12 App. Cas. 284; 53 N. Y. 515; 139 Mass. 318; 60 Mich. 397; 29 W. Va. 244; 39 Wis. 578; 50 Hun. 516.]

[6. When provisions are sold by dealers for domestic use, there is, by some authorities, an implied warranty that they are sound and wholesome; but not when they are sold to dealers as merchandise. (12 Johns. 468; 50 Barb. 116; 15 Hun. 504; 5 Den. 617; 9 Daly. 469; 145 Mass. 320; 21 Minn. 70; 57 Mich. 60; cf. 73 Mich. 541.) The first branch of this rule has, however, been chiefly applied in cases where the vendor knew and concealed the unsoundness. (Id.)]

7. Another class of cases, is that of goods bought by sample. Here it is implied that the quality of the bulk of the commodity shall be equal to that of the sample. (10 Wall. 383; 5 N. Y. 73 & 95; 73 Ia. 712; 7 Allen, 29; 32 Conn.

If cloth be delivered, or (in our legal dialect) bailed, to a tailor to make a suit of clothes, he has it upon an implied contract to render it again when made, and that in a workmanly manner. If money or goods be delivered to a common carrier, to convey from Oxford to London, he is under a contract in law to pay, or carry them, to the person appointed. If a horse, or other goods, be delivered to an innkeeper or his servants, he is bound to keep *them safely, and restore them when his guest leaves the [*452 house. If a man takes in a horse, or other cattle, to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them on demand to the owner. If a pawnbroker receives plate or jewels as a pledge, or security, for the repayment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledgor performs his part by redeeming them in due time : for the due execution of which contract many useful regulations are made by statute 30 Geo. II., ch. 24. And so if a landlord distrains goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distrainers, and they are bound by an implied contract in law to restore them on payment of the debt, duty, and expenses, before the time of sale : or, when sold, to render back the overplus. If a friend delivers anything to his friend to keep for him, the receiver is bound to restore it on demand ; and it was formerly held that in the mean time he was answerable for any damage or loss it might sustain, whether by accident or otherwise ; unless he expressly undertook to keep it only with the same care as his own goods, and then he should not be answerable for theft or other accidents. But now the law seems to be settled that such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is an evidence of fraud : but, if he undertakes specially to keep the goods safely and securely, he is bound to take the same care of them, as a prudent man would take of his own.¹⁸

148.) An executory contract may also be made to furnish goods equal to a sample. (12 App. Cas. 284 ; 58 N. Y. 358.) An implied warranty of merchantability or quality may hold good, though the goods supplied are equal to the sample exhibited. (12 App. Cas. 284 ; 149 Mass. 570.)

8. A sale of goods by a particular description imports a warranty that they are of that description. (149 Mass. 570 ; 71 N. Y. 118 ; 13 C. B. (N. S.) 447.)

¹⁸ The various forms of bailments are divisible into five classes : —

1. *Depositum* or deposit, where goods are delivered to the bailee to be

In all these instances there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his *con-
*453] session. It is not an absolute property, because of his *con- kept, and returned on demand, without recompense ; as, where valuables are deposited with a friend for safe-keeping.

2. *Mandatum*, or mandate, where the bailee or mandatary agrees to do something with or about the thing bailed, without recompense ; as, where one gratuitously undertakes to deliver a letter for another, or carry goods to a certain place, or pay over money which he has received from the bailor.

3. *Commodatum*, or loan, where the thing bailed is lent for the bailee's use, without pay, and is to be itself returned.

4. *Pignus*, or pledge, where the thing bailed is given as security for a debt ; as, where a person borrows money, and gives some article of value to be held as security.

5. *Locatio*, or hiring for a recompense. This is of three kinds : (a) *locatio rei*, the hiring of a thing, as where a person hires a horse for temporary use ;—(b) *locatio operis faciendi*, the hiring of the performance of work or labor, care or attention, upon the property delivered to the bailee ; as where cloth is delivered to a tailor to be made into a coat ;—(c) *locatio operis mercium vehendarum*, the hiring of the carriage of goods from one place to another ; as where goods are delivered to a railway or stage company for transportation to a particular destination.

When the bailment is exclusively for the bailor's benefit, the bailee is held responsible only for the exercise of slight care, and is answerable only for gross negligence ; this rule applies to deposits and mandates. When it is wholly for the bailee's benefit, as in *commodatum*, he is bound to exercise the greatest care, and is responsible for even slight negligence. But when the bailment is for the benefit of both bailor and bailee, the bailee is only required to use ordinary care, and is only liable for ordinary negligence. This rule applies to such forms of bailment as *pignus* and *locatio* ; for the bailee obtains the goods for security or use, while the bailor receives a recompense. But there are certain kinds of bailment, included within the class *locatio*, to which this rule does not extend. Inn-keepers and common carriers of goods are held at common-law to be *insurers* of the goods entrusted to them ; responsible for all losses or injuries occasioned by any cause, other than the act of God or the public enemy, or the fraud or negligence of the bailor himself, or his servants. They are, therefore, ordinarily liable in case of loss, irrespective of their care or negligence. But this onerous responsibility of inn-keepers has been, in modern times, generally limited or qualified by statute ; while common carriers usually limit their extreme liability by contract with the shipper of goods, which, when reasonable in its provisions for exemption from responsibility, is sustained by the courts. But there is some difference of doctrine among the States of this country as to what contracts of this nature shall be upheld. Thus, in some States, it is deemed unreasonable to allow the carrier to stipulate for exemption from responsibility, in case of loss occasioned by his *negligence* ; while, in others, such contracts are held valid. The former is the prevailing doctrine, but the latter is

tract for restitution ; the bailor having still left in him the right to a *chose* in action, grounded upon such contract. And, on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action against such as injure or take away these chattels. The tailor, the carrier, the innkeeper, the agisting farmer, the pawnbroker, the distrainer, and the general bailee, may all of them vindicate, in their own right, this their possessory interest, against any stranger or third person. For, being responsible to the bailor, or if the goods are lost or damaged by his wilful default or gross negligence, or if he do not deliver up the chattels on lawful demand, it is therefore reasonable that he should have a right of action against all other persons who may have purloined or injured them ; that he may always be ready to answer the call of the bailor.

3. Hiring and *borrowing* are also contracts by which a qualified property may be transferred to the hirer or borrower : in which there is only this difference, that hiring is always for a price, or stipend, or additional recompense ; borrowing is merely gratuitous. But the law in both cases is the same. They are both contracts, whereby the possession and a transient property is transferred for a particular time or use, on condition to restore the goods so hired or borrowed, as soon as the time is expired or use performed ; together with the price or stipend (in case of hiring) either expressly agreed on by the parties, or left to be implied by law according to the value of the service. By this mutual contract, the hirer or borrower gains a temporary property in the thing hired, accompanied with an implied condition to use it with moderation, and not to abuse it ; and the owner or lender retains a reversionary interest in the same, and acquires a new property in the price or reward. Thus if a man hires or borrows a horse for a month, he has the possession and a qualified property therein during that period ; on the expiration of which his qualified property determines, and the owner becomes (in case of hiring) entitled also to the price for which the horse was hired.

*There is one species of this price or reward, the most [*454

established in New York. Carriers of passengers are not considered as insurers of the passengers' safety ; but are bound to use the utmost care and precaution to prevent injury, and are responsible for even slight negligence, if damage results therefrom. (See, generally, Schouler on Bailments.)

usual of any, but concerning which many good and learned men have in former times very much perplexed themselves and other people, by raising doubts about its legality *in foro conscientiæ*. That is when money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for the use ; which generally is called *interest* by those who think it lawful, and *usury* by those who do not so. For the enemies to interest in general make no distinction between that and usury, holding any increase of money to be indefensibly usurious. And this they ground as well on the prohibition of it by the law of Moses among the Jews, as also upon what is said to be laid down by Aristotle, that money is naturally barren, and to make it breed money is preposterous and a perversion of the end of its institution, which was only to serve the purposes of exchange and not of increase. Hence the school divines have branded the practice of taking interest, as being contrary to the Divine law both natural and revealed ; and the canon law has prescribed the taking any, the least, increase for the loan of money as a mortal sin.

But, in answer to this, it hath been observed, that the Mosaical precept was clearly a political, and not a moral precept. It only prohibited the Jews from taking usury from their brethren the Jews ; but in express words permitted them to take it of a stranger : which proves that the taking of moderate usury, or a reward for the use, for so the word signifies, is not *malum in se* ; since it was allowed where any but an Israelite was concerned. And as to the reason supposed to be given by Aristotle and deduced from the natural barrenness of money, the same may with equal force be alleged of houses, which never breed houses ; and twenty other things, which nobody doubts it is lawful to make profit of, by letting them to hire. And, though money was originally used only for the purposes of exchange, yet the *455] laws of any state *may be well justified in permitting it to be turned to the purposes of profit, if the convenience of society (the great end for which money was invented) shall require it. And that the allowance of moderate interest tends greatly to the benefit of the public, especially in a trading country, will appear from that generally acknowledged principle, that commerce cannot subsist without mutual and extensive credit. Unless money therefore can be borrowed, trade cannot be carried on ; and if no premium were allowed for the hire of money, few persons

would care to lend it ; or at least the ease of borrowing at a short warning (which is the life of commerce) would be entirely at an end. Thus, in the dark ages of monkish superstition and civil tyranny, when interest was laid under a total interdict, commerce was also at its lowest ebb, and fell entirely into the hands of the Jews and Lombards : but when men's minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit : and again introduced with itself its inseparable companion, the doctrine of loans upon interest. And as to any scruples of conscience, since all other conveniences of life may either be bought or hired, but money can only be hired, there seems to be no greater oppression in taking a recompense or price for the hire of this, than of any other convenience. To demand an exorbitant price is equally contrary to conscience, for the loan of a horse, or the loan of a sum of money : but a reasonable equivalent for the temporary inconvenience, which the owner may feel by the want of it, and for the hazard of his losing it entirely, is not more immoral in one case than it is in the other. Indeed the absolute prohibition of lending upon any, even moderate interest, introduces the very inconvenience which it seems meant to remedy. The necessity of individuals will make borrowing unavoidable. Without some profit allowed by law, there will be but few lenders ; and those principally bad men, who will break through the law, and take a profit ; and then will endeavor to indemnify themselves from the danger of the penalty, by making that profit exorbitant. A capital *distinction must therefore be made between a moderate [*456 and exorbitant profit ; to the former of which we usually give the name of interest, to the latter the truly odious appellation of usury : the former is necessary in every civil state, if it were but to exclude the latter, which ought never to be tolerated in any well regulated society. For as the whole of this matter is well summed up by Grotius : " If the compensation allowed by law does not exceed the proportion of the hazard run, or the want felt, by the loan, its allowance is neither repugnant to the revealed nor the natural law : but if it exceeds those bounds, it is then oppressive usury ; and though the municipal laws may give it impunity, they can never make it just."

We see that the exorbitance or moderation of interest, for money lent, depends upon two circumstances ; the inconvenience

of parting with it for the present, and the hazard of losing it entirely. The inconvenience to individual lenders can never be estimated by laws; the rate therefore of general interest must depend upon the usual or general inconvenience. This results entirely from the quantity of specie or current money in the kingdom; for the more specie there is circulating in any nation, the greater superfluity there will be, beyond what is necessary to carry on the business of exchange and the common concerns of life. In every nation or public community, there is a certain quantity of money thus necessary; which a person well skilled in political arithmetic might perhaps calculate as exactly, as a private banker can the demand for running cash in his own shop; all above this necessary quantity may be spared, or lent, without much inconvenience to the respective lenders; and the greater this national superfluity is, the more numerous will be the lenders, and the lower ought the rate of the national interest to be; but where there is not enough circulating cash, or barely enough, to answer the ordinary uses of the public, interest will be proportionably high; for lenders will be but few, as few can submit to the inconvenience of lending.

*457] * So also the hazard of an entire loss has its weight in the regulation of interest: hence the better the security, the lower will the interest be; the rate of interest being generally in a compound *ratio*, formed out of the inconvenience, and the hazard. And as, if there were no inconvenience, there should be no interest but what is equivalent to the hazard, so, if there were no hazard there ought to be no interest, save only what arises from the mere inconvenience of lending. Thus, if the quantity of specie in a nation be such, that the general inconvenience of lending for a year is computed to amount to *three per cent.*, a man that has money by him will perhaps lend it upon a good personal security at *five per cent.*, allowing two for the hazard run; he will lend it upon landed security or mortgage at *four per cent.*, the hazard being proportionably less; but he will lend it to the state, on the maintenance of which all his property depends, at *three per cent.*, the hazard being none at all.

But sometimes the hazard may be greater than the rate of interest allowed by law will compensate. And this gives rise to the practice of, 1. Bottomry, or *respondentia*. 2. Policies of insurance. 3. Annuities upon lives.

And first, *bottomry* (which originally arose from permitting the master of a ship, in a foreign country, to hypothecate the ship in order to raise money to refit) is in the nature of a mortgage of a ship; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or *bottom* of the ship (*partem pro toto*) as a security for the repayment. In which case it is understood, that if the ship be lost, the lender loses also his whole money; but, if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading *nations, for [*458 the benefit of commerce, and by reason of the extraordinary hazard run by the lender. And in this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent. But if the loan is not upon the vessel, but upon the goods and merchandise, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower, personally, is bound to answer the contract; who therefore in this case is said to take up money at *respondentia*. These terms are also applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself; when a man lends a merchant 1000*l.* to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case such a voyage be safely performed: which kind of agreement is sometimes called *fœnus nauticum*, and sometimes *usura maritima*. But as this gave an opening for usurious and gaming contracts, especially upon long voyages, it was enacted by the statute 19 Geo. II., ch. 37, that all monies lent on bottomry or at *respondentia*, on vessels bound to or from the East Indies, shall be expressly lent only upon the ship or upon the merchandise; that the lender shall have the benefit of salvage; and that if the borrower hath not an interest in the ship, or in the effects on board, equal to the value of the sum borrowed, he shall be responsible to the lender for so much of the principal as hath not been laid out, with legal interest and all other charges, though the ship and merchandise be totally lost.

Secondly, a policy of *insurance* is a contract between A. and B., that upon A.'s paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event.

This is founded upon one of the same principles as the doctrine of interest upon loans, that of hazard ; but not that of inconvenience. For if I insure a ship to the Levant, and back again, at *five per cent.*, here I calculate the chance that she performs her voyage to be twenty to one against her being lost ; and, if she be lost, I lose 100*l.* and get 5*l.* Now this is much the same as if I lend the merchant, whose whole fortunes are embarked in *459] this vessel, 100*l.* at *the rate of *eight per cent.* For by a loan I should be immediately out of possession of my money, the inconvenience of which we have supposed equal to *three per cent.* ; if therefore I had actually lent him 100*l.*, I must have added 3*l.* on the score of inconvenience, to the 5*l.* allowed for the hazard, which together would have made 8*l.* But, as upon an insurance, I am never out of possession of my money till the loss actually happens, nothing is therein allowed upon the principle of inconvenience, but all upon the principle of hazard. Thus, too, in a loan, if the chance of repayment depends upon the borrower's life, it is frequent (besides the usual rate of interest) for the borrower to have his life insured till the time of payment ; for which he is loaded with an additional premium, suited to his age and constitution. Thus, if Sempronius has only an annuity for his life, and would borrow 100*l.* of Titius for a year ; the inconvenience and general hazard of this loan, we have seen are equivalent to 5*l.*, which is therefore the legal interest ; but there is also a special hazard in this case ; for, if Sempronius dies within the year, Titius must lose the whole of his 100*l.* Suppose this chance to be as one to ten : it will follow that the extraordinary hazard is worth 10*l.* more, and therefore that the reasonable rate of interest in this case would be *fifteen per cent.* But this the law, to avoid abuses, will not permit to be taken ; Sempronius therefore gives Titius the lender only 5*l.*, the legal interest ; but applies to Gaius an insurer, and gives him the other 10*l.* to indemnify Titius against the extraordinary hazard. And in this manner may any extraordinary or particular hazard be provided against, which the established rate of interest will not reach ; that being calculated by the state to answer only the ordinary and general hazard, together with the lender's inconvenience in parting with his specie for the time. But in order to prevent these insurances from being turned into a mischievous kind of gaming, it is enacted by statute 14 Geo. III., ch. 48, that no in-

surance shall be made on lives, or on any other event, wherein the party insured hath no interest ; that in all policies the name of such interested party shall be *inserted ; and nothing [*460 more shall be recovered thereon than the amount of the interest of the insured.

This does not, however, extend to marine insurances, which were provided for by a prior law of their own. The learning relating to these insurances hath of late years been greatly improved by a series of judicial decisions : which have now established the law in such a variety of cases, that (if well and judiciously collected) they would form a very complete title in a code of commercial jurisprudence : but, being founded on equitable principles, which chiefly result from the special circumstances of the case, it is not easy to reduce them to any general heads in mere elementary institutes.¹⁴ Thus much, however, may be said ; that being contracts, the very essence of which consists in observing the purest good faith and integrity, they are vacated by any the least shadow of fraud or undue concealment ; and, on the other hand, being much for the benefit and extension of trade, by distributing the loss or gain among a number of adventurers, they are greatly encouraged and protected both by common law and acts of parliament. But as a practice had obtained of insuring large sums without having any property on board, which were called insurances, *interest or no interest*, and also of insuring the same goods several times over ; both of which were a species of gaming without any advantage to commerce, and were denominated *wagering* policies : it is therefore enacted by the stat. 19 Geo. II., ch. 37, that all insurance, interest or no interest, or without farther proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of salvage to the insurer (all of which had the same pernicious tendency), shall be totally

¹⁴ Besides marine insurance, referred to in the text, reference may be made to fire insurance and life insurance, which are also topics of much consequence under this general subject. A contract of fire insurance stipulates for indemnity or reimbursement, in case of loss by fire ; while a contract of life insurance stipulates for the payment of a certain sum of money to the representatives of the assured, in the event of his death. Life insurance is frequently resorted to as a means of securing a provision for a man's relatives, in case of his unexpected or premature death. But this subject is too extensive to be here considered at length. It is fully treated in Parsons on Contracts, vol. ii. pp. 350-488. (See also May on Insurance ; Bliss on Life Insurance.)

null and void, except upon privateers, or upon ships or merchandise from the Spanish and Portuguese dominions, for reasons sufficiently obvious; and that no re-assurance shall be lawful, except the former insurer shall be insolvent, a bankrupt, or dead: and lastly, that, in the East India trade, the lender of money on bottomry, or at *respondentia*, shall alone have a right to be insured for the money lent, and the borrower *shall (in case of a loss) recover no more upon any insurance than the surplus of his property, above the value of his bottomry, or *respondentia* bond.

Thirdly, the practice of purchasing *annuities for lives* at a certain price or premium, instead of advancing the same sum on an ordinary loan arises usually from the inability of the borrower to give the lender a permanent security for the return of the money borrowed, at any one period of time. He therefore stipulates (in effect) to repay annually, during his life, some part of the money borrowed; together with legal interest for so much of the principal as annually remains unpaid, and an additional compensation for the extraordinary hazard run, of losing that principal entirely by the contingency of the borrower's death: all which considerations, being calculated and blended together, will constitute the just proportion or *quantum* of the annuity which ought to be granted. The real value of that contingency must depend on the age, constitution, situation, and conduct of the borrower; and therefore the price of such annuities cannot, without the utmost difficulty, be reduced to any general rules. So that if, by the terms of the contract, the lender's principal is *bona fide* (and not colorably) put in jeopardy; no inequality of price will make it a usurious bargain; though, under some circumstances of imposition, it may be relieved against in equity. To throw however some check upon improvident transactions of this kind, which are usually carried on with great privacy, the statute 17 Geo. III., ch. 26, has directed, that upon the sale of any life annuity of more than the value of ten pounds *per annum* (unless on a sufficient pledge of lands in fee-simple or stock in the public funds) the true consideration, which shall be in money only, shall be set forth and described in the security itself; and a memorial of the date of the security of the names of the parties, *cestui que trusts*, *cestui que vies*, and witnesses, and of the consideration money, shall within twenty days after its execution

be enrolled in the court of chancery ; else the security shall be null and void ; and, in case of collusive practices respecting the consideration, the *court, in which any action is brought or [*462 judgment obtained upon such collusive security, may order the same to be cancelled, and the judgment (if any) to be vacated : and also all contracts for the purchase of annuities from infants shall remain utterly void, and be incapable of confirmation after such infants arrive to the age of maturity. But to return to the doctrine of common interest on loans :—

Upon the two principles of inconvenience and hazard, compared together, different nations have, at different times, established different rates of *interest*. The Romans at one time allowed *centesimæ*, one *per cent.* monthly, or *twelve per cent. per annum*, to be taken for common loans ; but Justinian reduced it to *trientes*, or one third of the *as*, or *centesimæ*, that is, *four per cent.* ; but allowed higher interest to be taken of merchants, because there the hazard was greater. So too Grotius informs us that in Holland the rate of interest was then eight *per cent.* [*463 in common loans, but twelve to merchants. And Lord Bacon was desirous of introducing a similar policy in England : but our law establishes one standard for all alike, where the pledge of security itself is not put in jeopardy ; lest, under the general pretense of vague and indeterminate hazard, a door should be opened to fraud and usury : leaving specific hazards to be provided against by specific insurances, by annuities for lives, or by loans upon *respondentia*, or bottomry. But as to the rate of legal interest, it has varied and decreased for two hundred years past, according as the quantity of specie in the kingdom has increased by accessions of trade, the introduction of paper credit, and other circumstances. The statute 37 Hen. VIII., ch. 9, confined interest to ten *per cent.*, and so did the statute 13 Eliz., ch. 8. But as through the encouragements given in her reign to commerce, the nation grew more wealthy, so under her successor the statute 21 Jac. I., ch. 17, reduced it to eight *per cent.* ; as did the statute 12 Car. II., ch. 13, to six : and lastly by the statute 12 Ann., st. 2, ch. 16, it was brought down to five *per cent.* yearly, which is now the extremity of legal interest that can be taken. But yet, if a contract which carries interest be made in a foreign country, our courts will direct the payment of interest according to the law of that country in which the contract was made. Thus, Irish,

*464] American, Turkish, and Indian interest, have *been allowed in our courts to the amount of even twelve *per cent.*: for the moderation or exorbitance of interest depends upon local circumstances; and the refusal to enforce such contracts would put a stop to all foreign trade. And, by statute 14 Geo. III., ch. 79, all mortgages and other securities upon estates or other property in Ireland or the plantations, bearing interest not exceeding six *per cent.*, shall be legal; though executed in the kingdom of Great Britain; unless the money lent shall be known at the time to exceed the value of the thing in pledge; in which case, also, to prevent usurious contracts at home under color of such foreign securities, the borrower shall forfeit treble the sum so borrowed.¹⁵

4. The last general species of contracts, which I have to mention, is that of *debt*; whereby a *chose* in action, or right to a certain sum of money, is mutually acquired and lost. This may be the counterpart of, and arise from any of the other species of contracts. As, in case of a sale, where the price is not paid in ready money, the vendee becomes indebted to the vendor for the sum agreed on; and the vendor has a property in this price, as a *chose* in action, by means of this contract of debt. In bailment, if the bailee loses or detains a sum of money bailed to him for any special purpose, he becomes indebted to the bailor in the same numerical sum, upon his implied contract, that he should execute the trust reposed in him, or repay the money to the bailor. Upon hiring or borrowing, the hirer or borrower, at the same time that he acquires a property in the thing lent, may also become indebted to the lender, upon his contract to restore the money borrowed, to pay the price or premium of the loan, the hire of the horse, or the like. Any contract in short whereby a

¹⁵ By statute 17 & 18 Vict., ch. 90 (1854), all existing laws of usury were repealed; and the rate of interest may now be regulated by the stipulations of the parties to any loan or contract. But, in many of the United States, statutes prohibiting usury are still in force. These statutes, however, differ considerably in the nature and scope of their provisions. In some States, a usurious contract is declared wholly void; in others, it is void as to the excess of interest reserved above the legal rate; while, in still others, the lender is obliged to forfeit the entire interest, or some specified multiple thereof. The rates of legal interest vary in different States, but in the majority it is six per cent. In some States, a particular rate is prescribed as applicable to all contracts in the absence of special agreement; but the parties are allowed to stipulate for a higher rate, if they choose

determinate sum of money becomes due to any person, and is not paid, but remains in action merely, is a contract of debt. And, taken in this light, it comprehends a great variety of *acquisition ; being usually divided into debts of *record*, [*465 debts by *special*, and debts by *simple* contract.

A debt of *record* is a sum of money, which appears to be due by the evidence of a court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law ; this is a contract of the highest nature, being established by the sentence of a court of judicature. Debts upon recognizance are also a sum of money, recognized or acknowledged to be due to the crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behavior, or the like : and these, together with statutes merchant and statutes staple, etc., if forfeited by non-performance of the condition, are also ranked among this first and principal class of debts, *viz.*, debts of record ; since the contract, on which they are founded, is witnessed by the highest kind of evidence, *viz.*, by matter of record.

Debts by *specialty*, or special contract, are such whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal. Such as by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation ; which last we took occasion to explain in the twentieth chapter of the present book ; and then showed that it is a creation or acknowledgment of a debt from the obligor to the obligee, unless the obligor performs a condition thereunto usually annexed, as the payment of rent or money borrowed, the observance of a covenant, and the like ; on failure of which the bond becomes forfeited and the debt becomes due in law. These are looked upon as the next class of debts after those of record, being confirmed by special evidence, under seal.

Debts by *simple contract* are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any ; or by notes *unsealed, [*466 which are capable of a more easy proof, and (therefore only) better, than a verbal promise. It is easy to see into what a vast variety of obligations this last class may be branched out, through

the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law. Some of these we have already occasionally hinted at : and the rest, to avoid repetition, must be referred to those particular heads in the third book of these Commentaries, where the breach of such contracts will be considered. I shall only observe at present, that by the statute 29 Car. II., ch. 3, no executor or administrator shall be charged upon any special promise to answer damages, out of his own estate, and no person shall be charged upon any promise to answer for the debt or default of another, or upon any agreement in consideration of marriage, or upon any contract or sale of any real estate, or upon any agreement that is not to be performed within one year from the making ; unless the agreement or some memorandum thereof be in writing, and signed by the party himself, or by his authority.¹⁶

But there is one species of debts upon simple contract, which, being a transaction now introduced into all sorts of civil life, under the name of *paper credit*, deserves a more particular regard. These are debts by *bills of exchange* and *promissory notes*.

A *bill of exchange* is a security, originally invented among merchants in different countries, for the more easy remittance of money from the one to the other, which has since spread itself into almost all pecuniary transactions. It is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account ; by which means a man at the most distant part of the world may have money remitted to him from any trading country. If A. lives in Jamaica, and owes B., who lives in England, 1000*l.*, now if C. be going from England to Jamaica, he may pay B. this 1000*l.*, and take a bill of exchange drawn by B. in England upon A. in Jamaica, and receive it when he comes thither. Thus does B. receive his debt, at any distance of place, by transferring it to C. ; who carries over his money *in paper credit, without danger of robbery or loss. This method is said to have been brought into general use by the Jews and Lombards, when banished for their usury and other vices ; in order the more easily to draw their effects out of France and England into those countries in which

¹⁶ These provisions of the English Statute of Frauds are also found in the statutes of frauds in force in the several States of this country, and are of much consequence.

they had chosen to reside. But the invention of it was a little earlier; for the Jews were banished out of Guienne in 1287, and out of England in 1290; and in 1236 the use of paper credit was introduced into the Mogul empire in China. In common speech such a bill is frequently called a *draft*, but a *bill of exchange* is the more legal as well as mercantile expression. The person, however, who writes this letter, is called in law the *drawer*, and he to whom it is written the *drawee*; and the third person, or negotiator, to whom it is payable (whether especially named, or the *bearer* generally) is called the *payee*.

These bills are either *foreign*, or *inland*; *foreign*, when drawn by a merchant residing abroad upon his correspondent in England, or *vice versa*; and *inland*, when both the drawer and the drawee reside within the kingdom.¹⁷ Formerly foreign bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now by two statutes, the one 9 & 10 Wm. III., ch. 17, the other 3 & 4 Ann., ch. 9, inland bills of exchange are put upon the same footing as foreign ones; what was the law and custom of merchants with regard to the one, and taken notice of merely as such, being by those statutes expressly enacted with regard to the other. So that now there is not in law any manner of difference between them.

Promissory notes, or notes of hand, are a plain and direct engagement in writing, to pay a sum specified at the time therein limited to a person therein named, or sometimes to his order, or often to the bearer at large. These also, by the same statute 3 & 4 Ann., ch. 9, are made assignable and indorsable in like manner as bills of exchange. But, by statute 15 Geo. III., ch. 51, all promissory or other notes, *bills of exchange, drafts, [*468 and undertakings in writing, being negotiable or transferable, for the payment of less than twenty shillings, are declared to be null and void; and it is made penal to utter or publish any such; they being deemed prejudicial to trade and public credit. And by 17 Geo. III., ch. 30, all such notes, bills, drafts, and undertakings, to the amount of twenty shillings, and less than five pounds,

¹⁷ The several States of the Union are considered to be foreign to each other with reference to this distinction; and a bill drawn in one State upon a person resident in another, is deemed a foreign bill. (*Buckner v. Finley*, 2 Peters, 586.)

are subjected to many other regulations and formalities ; the omission of any one of which vacates the security, and is penal to him that utters it.¹⁸

The payee, we may observe, either of a bill of exchange or promissory note, has clearly a property vested in him (not indeed in possession but in action) by the *express* contract of the drawer in the case of a promissory note, and, in the case of a bill of exchange, by his *implied* contract, *viz.* that, provided the drawee does not pay the bill, the drawer will : for which reason it is usual in bills of exchange to express that the *value* thereof hath been *received* by the drawer ; in order to show the consideration upon which the implied contract of repayment arises. And this property so vested, may be transferred and assigned from the payee to any other man ; contrary to the general rule of the common law, that no *chose* in action is assignable : which assignment is the life of paper credit. It may therefore be of some use to mention a few of the principal incidents attending this transfer or assignment, in order to make it regular, and thereby to charge the drawer with the payment of the debt to other persons than those with whom he originally contracted.

In the first place, then, the payee, or person to whom or whose *order* such bill of exchange or promissory note is payable, may by indorsement, or writing his name in *dorso*, or on the back of it, assign over his whole property to the bearer, or else to another person by name, either of whom is then called the indorsee : and he may assign the same to another, and so on *in infinitum*. And a promissory note, payable to A. or *bearer*, is negotiable without any indorsement, and payment thereof may be demanded by any *469] bearer *of it. But, in case of a bill of exchange, the payee, or the indorsee (whether it be a general or particular indorsement), is to go to the drawee, and offer his bill for acceptance ; which acceptance (so as to charge the drawer with costs) must be in writing, under or on the back of the bill. If the drawee accepts the bill, either verbally or in writing, he then makes himself liable to pay it ; this being now a contract on his side, grounded on an acknowledgment that the drawer has effects in his hands, or at

¹⁸ The statutes, 15 Geo. III., ch. 51, and 17 Geo. III., ch. 30, have been superseded by later legislation. The chief rule now in force is, that promissory notes under £5, payable to bearer on demand, are illegal. (26 & 27 Vict., ch. 105.) In this country, such statutes have seldom or never been enacted.

least credit sufficient to warrant the payment. If the drawee refuses to accept the bill, and it be of the value of 20*l.* or upwards, and expressed to be for value received, the payee or indorsee may protest it for *non-acceptance*; which protest must be made in writing, under a copy of such bill of exchange, by some notary public; or, if no such notary be resident in the place, then by any other substantial inhabitant in the presence of two credible witnesses; and notice of such protest must, within fourteen days after, be given to the drawer.¹⁹

But in case such bill be accepted by the drawee, and after acceptance he fails or refuses to pay it within three days after it becomes due (which three days are called days of grace), the payee or indorsee is then to get it protested for *non-payment*, in the same manner, and by the same persons who are to protest it in case of non-acceptance, and such protest must also be notified, within fourteen days after, to the drawer. And he, on producing such protest, either of non-acceptance, or non-payment, is bound to make good to the payee, or indorsee, not only the amount of the said bills (which he is bound to do within a reasonable time after non-payment, without any protest, by the rules of the common-law), but also interest and all charges, to be computed from the time of making such protest. But if no protest be made or notified to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill. The bill, when refused, must be demanded of the drawer as soon as conveniently may be: for

¹⁹[With respect to *acceptance* and *protest*, the law now is, in several material points, different from the statement of it in the text. Acceptance is not necessary, though usual and desirable, on bills payable at a certain time; but when the bill is payable at a certain distance of time after *sight*, then acceptance is essential, and should not be delayed, because (as the time for payment of the bill does not begin to run until it is accepted), the responsibility of the drawer would be thereby protracted. Acceptance must now, in all cases, be in writing upon the bill, and must be signed by the acceptor, or some person duly authorized by him. But if the bill be presented and acceptance be refused, prompt notice (within fourteen days will not suffice, but usually the next day to the immediate indorser, and each indorser is allowed a day) must be given to the drawer and indorsers, or they will be discharged from responsibility. Upon non-acceptance, the holder may immediately sue the drawer and indorsers, without waiting until the bill becomes due, according to the terms of it.] It is also the generally established rule, in the United States, that acceptances must be in writing on the face of the bill. The rules in regard to the time of giving notice are also substantially the same as in England. (See Daniel on Negotiable Instruments; Parsons on Bills and Notes.)

***470]** though, when one draws a bill of *exchange, he subjects himself to the payment, if the person on whom it is drawn refuses either to accept or pay, yet that is with this limitation, that if the bill be not paid when due, the person to whom it is payable shall in convenient time give the drawer notice thereof; for otherwise the law will imply it paid: since it would be prejudicial to commerce if a bill might rise up to charge the drawer at any distance of time: when in the meantime all reckonings and accounts may be adjusted between the drawer and the drawee.

If the bill be an indorsed bill, and the indorsee cannot get the drawee to discharge it, he may call upon either the drawer or the indorser, or if the bill has been negotiated through many hands, upon any of the indorsers; for each indorser is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the indorsers, as of the drawer. And if such indorser, so called upon, has the names of one or more indorsers prior to his own, to each of whom he is properly an indorsee, he is also at liberty to call upon any of them to make him satisfaction; and so upwards. But the first indorser has nobody to resort to but the drawer only.

What has been said of bills of exchange is applicable also to promissory notes, that are indorsed over, and negotiated from one hand to another; only that, in this case, as there is no drawee, there can be no protest for non-acceptance; or rather the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. And, in case of non-payment by the drawer, the several indorsees of a promissory note have the same remedy, as upon bills of exchange, against the prior indorsers.

⁹⁰ The law of England in regard to bills of exchange and promissory notes has been recently fully codified by an important statute (45 & 46 Vict., c. 61). The American law on these subjects is so similar that this statute will be found useful for reference in this country.

CHAPTER XXX.

[BL. COMM.—BOOK II. CH. XXXI.]

Of Title by Bankruptcy.

THE preceding chapter having treated pretty largely of the acquisition of personal property by several commercial methods, we from thence shall be easily led to take into our present consideration a tenth method of transferring property, which is that of:—

X. Bankruptcy ; a title which we before lightly touched upon, so far as it related to the transfer of the real estate of the bankrupt. At present we are to treat of it more minutely, as it principally relates to the disposition of chattels, in which the property of persons concerned in trade more usually consists, than in lands or tenements. Let us, therefore, first of all consider, 1. *Who* may become a bankrupt: 2. What *acts* make a bankrupt: 3. The *proceedings* on a commission of bankrupt: and, 4. In what manner an estate in goods and chattels may be *transferred* by bankruptcy.

1. Who may become a bankrupt. A bankrupt was before defined to be “a trader, who secretes himself,” or “does certain other acts, tending to defraud his creditors.” He was formerly considered merely in the light of a criminal or offender ; and in this spirit we are told by Sir Edward Coke, that we have fetched as well the name as the wickedness *of bankrupts [*472 from foreign nations. But at present the laws of bankruptcy are considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice ; and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself. On the creditors, by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment : on the debtor, by exempting him from the rigor of the general law, whereby his person might be confined at the discretion of his creditor, though in reality he has nothing to satisfy the debt : whereas the law of

bankrupts, taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary emoluments, upon condition they surrender up their whole estate to be divided among their creditors.¹

In this respect our Legislature seems to have attended to the example of the Roman law. I mean not the terrible law of the twelve tables; whereby the creditors might cut the debtor's body into pieces, and each of them take his proportionable share: if, indeed, that law, *de debitore in partes secundo*, is to be understood in so very butcherly a light; which many learned men have with reason doubted. Nor do I mean those less inhuman laws (if

¹ *Insolvency*.—Under the former English law, a precise distinction was drawn between bankruptcy and insolvency. A bankrupt was a *trader*, who had become unable to pay his debts; while an insolvent was a non-trader, who could not discharge his obligations. Laws providing for the distribution of assets among creditors, were termed bankrupt or insolvent laws, according to their application to one or the other class of debtors. Bankrupt laws also had the effect to discharge a trader entirely from his indebtedness; while insolvent laws only relieved a debtor from the penalty of imprisonment, but left subsequently acquired property subject to the claim of creditors. But, under the present English law, these distinctions are discarded; and it is provided that all persons may be adjudged bankrupts, whether they are traders or not, and may be discharged from their indebtedness upon fulfilling the requirements of the statute. 46 & 47 Vict., ch. 52.) In the United States, these distinctions have not been regarded in legislation; but a discrimination of a different kind has been made in the use of these terms, though it has not been observed or applied with much strictness. Thus, the laws enacted by Congress upon this subject, in pursuance of the power given by the Constitution to establish a uniform rule on the subject of bankruptcies, have been termed "bankrupt laws;" while statutes of similar scope and purport, enacted by the several States, when no bankrupt law of Congress was in force, have been, by way of distinction, designated as "insolvent laws." The distinction, therefore, depended, not upon the nature of the provisions found in these statutes, but upon their enactment by Congress or a State legislature; but since this is a comparatively unimportant ground of discrimination, the terms, "bankruptcy" and "insolvency," were frequently used interchangeably. It was held that a bankrupt law might contain those provisions which are generally found in insolvent laws, and *vice versa*. At the present time (1890) there is no U. S. bankrupt law in force, the last one, that of March 2, 1867, having been repealed September 1, 1878. Upon its repeal the insolvent laws of the several States came into effect and are now in force. But it is not improbable that another bankrupt law will be passed within a few years, as there appears to be a strong sentiment in its favor throughout the country. A summary of the last bankrupt law is given in note 2, *post*, for though not now in force, its provisions well illustrate the general nature of both bankrupt and insolvent laws, and it will be useful to show the character of such legislation.

they may be called so, as *their* meaning is indisputably certain), of imprisoning the debtor's person in chains ; subjecting him to stripes and hard labor, at the mercy of his rigid creditor ; and sometimes selling him, his wife, and children, to perpetual foreign slavery, *trans Tiberim* : an oppression which produced so many *popular insurrections, and secessions to the *mons sacer*. [*473 But I mean the law of *cession*, introduced by the Christian emperors ; whereby, if a debtor *ceded*, or yielded up all his fortune to his creditors, he was secured from being dragged to a gaol, "*omni quoque corporali cruciату semoto*." For, as the emperor justly observes, "*inhumanum erat spoliatum fortunis suis in solidum damnari*." Thus far was just and reasonable : but, as the departing from one extreme is apt to produce its opposite, we find it afterwards enacted that, if the debtor by any unforeseen accident was reduced to low circumstances, and would *swear* that he had not sufficient left to pay his debts, he should not be compelled to cede or give up even that which he had in his possession : a law, which under a false notion of humanity, seems to be fertile of perjury, injustice, and absurdity.

The laws of England, more wisely, have steered in the middle between both extremes : providing at once against the inhumanity of the creditor, who is not suffered to confine an honest bankrupt after his effects are delivered up ; and at the same time taking care that all his just debts shall be paid, so far as the effects will extend. But still they are cautious of encouraging prodigality and extravagance by this indulgence to debtors ; and therefore they allow the benefit of the laws of bankruptcy to none but actual *traders* ; since that set of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own. If persons in other situations of life run in debt without the power of payment, they must take the consequences of their own indiscretion, even though they meet with sudden accidents that may reduce their fortunes : for the law holds it to be an unjustifiable practice for any person but a trader to encumber himself with debts of any considerable value. If a gentleman, or *one in a lib- [*474 eral profession, at the time of contracting his debts, has a sufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor : and if, at such a time, he has no sufficient fund, the dishonesty and injus-

tice is the greater. He cannot therefore murmur, if he suffers the punishment which he has voluntarily drawn upon himself. But in mercantile transactions the case is far otherwise. Trade cannot be carried on without mutual credit on both sides ; the contracting of debts is therefore here not only justifiable, but necessary. And if by accidental calamities, as, by the loss of a ship in a tempest, the failure of brother traders, or by the non-payment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts, it is his misfortune and not his fault. To the misfortunes, therefore, of debtors, the law has given a compassionate remedy, but denies it to their faults : since, at the same time that it provides for the security of commerce, by enacting that every considerable trader may be declared a bankrupt, for the benefit of his creditors as well as himself, it has also (to discourage extravagance) declared that no one shall be capable of being made a bankrupt, but only a *trader* ; nor capable of receiving the full benefit of the statutes, but only an *industrious* trader.*

* The succeeding portions of this chapter, in the original text, consist of a statement of the statutory law upon the subject of bankruptcy, which has been wholly abrogated by later enactments, since these Commentaries were written. It has, therefore, been deemed expedient to omit them in this edition, as at present of no practical importance, and to insert in their place a summary of the English bankrupt law now in force. This is the statute 46 & 47 Vict., c. 52, enacted in 1883. The general similarity of the English bankrupt law to our bankrupt and insolvent laws will render it of interest and value to the American student. The leading provisions of the last United States bankrupt law will be found in the succeeding note.² This law was repealed September 1, 1878. (See note 1, *ante*.)

² By the United States Constitution, Congress possesses power to establish uniform laws on the subject of bankruptcies, throughout the Union. This power has been exercised by the enactment of bankruptcy laws on three several occasions — first, by the Act of 1800, repealed in 1803 ; second, by the Act of 1841, repealed in 1843 ; and third, by the Act of March 2, 1867, which, after sundry modifications by a number of amendatory statutes, continued in force until September 1, 1878. This statute superseded the systems of insolvent laws of the several States, and prevailed uniformly throughout the entire country. The tribunals having jurisdiction in bankruptcy cases, were the courts of the United States. Provision was made by the act for adjudging a person a bankrupt upon his own application, or upon the application of his creditors. In the first case, the bankruptcy was denominated “voluntary,” in the second, “involuntary.” The act applied not only to “traders,” but to

[For a long time, all bankruptcy acts were confined in their operation to traders only. Persons who were not traders were left to the ordinary course of law, and could only get rid of the

"any person residing within the jurisdiction of the United States, and owing debts provable in bankruptcy, exceeding the amount of \$300." Such a person might become a voluntary bankrupt by applying by petition to the judge of the proper district, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his property for the benefit of his creditors, and his desire to obtain a discharge from his debts. To this petition must be annexed a schedule containing a full statement of all his debts, of the names of the respective creditors, of the consideration of each debt, and of any security given for its payment; and also an inventory of all his property, both real and personal. He was, thereupon, adjudged a bankrupt, and notice was given to his creditors.

An adjudication of involuntary bankruptcy might be obtained, when a debtor, whose indebtedness exceeded \$300, committed one of the following acts of bankruptcy, which the act enumerated: (1) Departing from the State, district, or territory, of which he was an inhabitant, with intent to defraud his creditors; or, when absent, remaining absent with like intent. (2) Concealing himself to avoid the service of legal process for the recovery of a debt payable under the act. (3) Concealing or removing property to avoid its attachment under legal process. (4) Making any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, with intent to delay, defraud, or hinder his creditors. (5) Being under arrest upon legal process, founded upon a claim in its nature provable against a bankrupt's estate, and for a sum exceeding \$100, for a period of 7 days; or being actually imprisoned for more than 7 days in a civil action founded upon contract for \$100 or a larger sum. (6) Making any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or confessing judgment, or giving warrant to confess judgment, while bankrupt or insolvent, or in contemplation of bankruptcy or insolvency; or procuring his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to persons liable for him as sureties or otherwise, or with intent, by such disposition of his property, to defeat or delay the operation of the act. (7) Being a banker, broker, merchant, trader, manufacturer, or miner, and fraudulently stopping payment, or suspending and not resuming payment of his commercial paper, within a period of 14 days. The petition might be made by a creditor or creditors, the aggregate of whose provable debts amounted to at least \$250; and was to be brought within six months after the alleged act of bankruptcy had been committed.

Provision was also made by the act, for restraining transfers of property by the debtor; for holding meetings of creditors; for the appointment of an assignee in bankruptcy to collect the debtor's assets for the benefit of creditors, and to settle the estate, etc. The assignee was chosen by the greater part in value and in number of the creditors, who had proved their debts,

burden of their debts by paying them, and no means existed for an enforced distribution of their estates. Under these statutes, it was held that buying only, or selling only, would not qualify a man to be a bankrupt; but it must be both buying and selling, and also getting a livelihood by it, as by exercising the calling of a merchant, a grocer, etc. But no handicraft occupation would make a man a regular bankrupt; as that of a husbandman, gardener, and the like, who are paid for their work and labor. When, however, persons buy goods, and make them up into salable commodities—as shoe-makers, smiths, and the like—here, though part of the gain is by bodily labor, and not by buying and selling,

subject to the approval of the judge. He might be required to give a bond for the faithful performance of the trust confided to him. As soon as he was appointed and qualified, the judge, or register in bankruptcy, assigned and conveyed to him all the estate, real and personal, of the bankrupt, with all the deeds, books, and papers relating thereto; and this assignment vested all such property and estate in the assignee, and dissolved any attachment made thereon within four months before the commencement of bankruptcy proceedings. But there were exempted from the operation of this conveyance certain articles of domestic use and convenience, to the value of \$500; also wearing apparel, and such other property as was exempted from attachment or levy by the laws of the United States, or by the laws of the bankrupt's State, in force in 1871. Such articles were reserved to the bankrupt. The assignee was empowered to enforce all claims or rights of action belonging to the debtor, and to collect all available assets for distribution among the creditors who had proved their claims. This distribution was made *pro rata*, without any priority or preference whatever, except in specially excepted cases. Thus, it was provided that the following claims were entitled to priority, and were to be first paid in full, in successive order: (1) The fees, costs, and expenses of suits, and of the several proceedings in bankruptcy. (2) All debts, taxes, or assessments due to the United States. (3) Debts, taxes, and assessments due to the State wherein the proceedings were pending. (4) Wages, not exceeding \$50, due to any operative, clerk, or house-servant, for labor performed within six months before the bankruptcy proceedings. (5) Debts due to any persons who, by the laws of the United States, were entitled to a priority. In regard to other claims, dividends were declared, and each creditor received the same percentage.

At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts had been proved, or no assets had come to the hands of the assignee, at any time after 60 days, and before the final disposition of the cause, the bankrupt might apply to the court for a discharge from his debts. No discharge would be granted if the debtor had been guilty of any one of a number of fraudulent acts or transactions which the act specially enumerated. No discharge was granted to a debtor whose assets were not equal to 50 per cent. of the claims proved against the estate, upon which he was liable as principal debtor, without the assent in writing of a majority in number and value of his creditors who had proved their claims and to whom he was liable as principal debtor. But a person who was once discharged, and became subsequently a voluntary bankrupt, was not entitled to a second discharge, unless his estate paid 70 per cent. of his debts, or he obtained the assent, in writing, of three-fourths of his creditors in value; there were some exceptions, however, to this rule.

There were also provisions in the act for the appointment of registers in bankruptcy for the transaction of administrative or non-litigated business connected with the proceedings in bankruptcy. There were also special provisions with reference to the bankruptcy of partnerships and corporations. (See U. S. Rev. Stat., Title lxi.)

yet they were held to be within the statutes of bankrupts ; for the labor is only in melioration of the commodity, and rendering it more fit for sale. Moreover, it was held that one single act of buying and selling would not make a man a trader, but there must be a repeated practice and profit by it. This distinction between traders and non-traders was first broken into by an act, taking effect in 1861, by which all persons were made liable to become bankrupt. And now, under the act which will henceforth regulate this branch of our law, the distinction is also discarded.

We will now give a short account of the provisions of this new act. (46 & 47 Vict. c. 52.)

1. All persons, even including persons who have privilege of parliament, may be adjudged bankrupt, whether they be traders or not.

A person becomes a bankrupt when adjudged so by the court, either upon his own petition, or upon the petition of a creditor, whose debt, which must be a liquidated and unsecured debt, amounts to £50 or upwards, or of several creditors whose debts in the aggregate amount to that sum at least. But before a creditor's petition can be presented, the debtor must have committed one of the acts or defaults, which are in the next paragraph termed "acts of bankruptcy." A debtor's petition is itself an act of bankruptcy.

2. Acts of bankruptcy are: (1) making a conveyance or assignment of his property to a trustee for the benefit of his creditors generally. (2) Making a fraudulent conveyance, gift, delivery, or transfer of his property, or any part of it. (3) Making a transfer of his property or any part of it, or creating any charge thereon, which would be void as a fraudulent preference, if he were adjudged bankrupt. (4) Doing, with intent to defeat or delay his creditors, any of the following acts: *viz.*, departing from or remaining out of England; or departing from his dwelling-house, or otherwise absenting himself; or beginning to keep house. (5) Filing in the proper court a declaration that he is unable to pay his debts, or presenting a bankruptcy petition against himself. (6) Having execution levied by seizure and sale of his goods, under civil process. (7) Receiving a bankruptcy notice from a judgment creditor,

requiring him to pay the judgment or to secure or compound for it, and failing within a prescribed time to comply with the notice or to satisfy the court that he has a counter-claim which exceeds the judgment debt. (8) Giving notice to any of his creditors that he has suspended or is about to suspend payment of his debts.

3. A creditor's petition must be made within three months after the act of bankruptcy is committed; and upon due proof of its allegations, an order may be made appointing a receiver for the protection of the estate. Such an order is also made upon a debtor's petition. No creditor can then have any remedy or action against the debtor without the leave of the court. After a receiver is appointed, a general meeting of the creditors is held as soon as may be, at which they are to determine whether they will agree to a composition with the debtor or prefer that he be adjudged bankrupt. If a majority of them, representing three-fourths in value of all the creditors who have proved, agree to the composition, it will, if approved by the court, be carried into effect; and if a trustee be appointed under it, he is subject to the same regulations as a trustee in bankruptcy. But if no composition is arranged in this way, or, if agreed upon, is not approved by the court, the debtor will be adjudged a bankrupt. The act of bankruptcy upon which the petition is founded, or the earliest act of bankruptcy that is proved to have been committed within three months before the petition is presented, constitutes the commencement of the bankruptcy.

As soon as an order of adjudication has been made, the property of the debtor becomes divisible among his creditors. The creditors may appoint some fit person, whether a creditor or not, as the trustee, and also nominate some other fit persons (not more than five nor less than three), who are to be creditors who have proved their debts or their proxies, as a committee of inspection, for the purpose of superintending the administration of the bankrupt's property by the trustee; or the creditors may leave the appointment of the trustee to the committee. The title of the trustee relates back to the commencement of the bankruptcy. After the adjudication of bankruptcy, the creditors may agree to a composition with the debtor, and if this is approved by the court, the bankruptcy will be annulled, and the composition will be enforceable as if it had been agreed upon beforehand.

4. The property which is to be divisible among the creditors is not to include any property held by the bankrupt in trust for any other person, nor the tools of his trade, nor the necessary wearing apparel and bedding of himself, his wife, and

children; such tools, apparel and bedding not exceeding in value the sum of £20. But it is to include (1) All such property as may be vested in the bankrupt at the beginning of the bankruptcy, or may be acquired by, or devolve upon him during its continuance; (2) The capacity to exercise, or take proceedings to exercise, all powers over property, which might be exercised by the bankrupt for his own benefit at the beginning, or at any time during the continuance, of the bankruptcy; (3) All goods being, at the beginning of the bankruptcy, in the possession, order, or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; but it is provided that things in action, other than debts due or growing due to him in the course of his trade or business are not to be deemed goods, within the meaning of this section.

Upon the appointment of the trustee, the property vests without any conveyance, assignment, or transfer in him; and the certificate by the court of his appointment constitutes his title-deed. It is the duty of the trustee to realize all the property, and, except in special cases, convert it into money, and from time to time (acting with the sanction of the committee) to divide it ratably among the creditors according to the amount of their debts. Large powers of administration are given to the trustee for these purposes; as to the debts, they are to be paid ratably, with certain exceptions, the most important of which are taxes, and the wages of clerks, servants, and workmen, which have priority over all other debts. The debts provable in bankruptcy include all debts and liabilities, except those of the nature of unliquidated damages arising otherwise than by contract or promise or breach of trust, and also except debts incurred after an act of bankruptcy with a person who had notice of the act. Interest may be allowed in proper cases, and claims not yet due may be proved with a rebate.

When the whole of the property has been realized for the benefit of the creditors, or as much of it as, in the opinion of the trustee and the committee, can be realized without needlessly protracting the trusteeship, the trustee declares a final dividend; and after sufficient time is given for the satisfactory proof of claims which have been presented but not duly proved, the bankrupt's property is distributed among the creditors who have proved their debts. Any surplus after paying debts and expenses is restored to the bankrupt. The trustee may thereupon be relieved of his office, if his acts and conduct are approved.

The bankrupt may apply for his discharge at any time after being adjudged bankrupt. The court then considers his conduct and affairs, and may either grant an absolute order of discharge, or, if he has been guilty of various negligent or wrongful acts (such as not keeping proper books of account, trading after knowing of his insolvency, bringing on his bankruptcy by rash speculation, being guilty of fraud, etc.), may refuse such an order, or suspend the operation of the order for a specified time, or grant it subject to any conditions with respect to any income or property that he may afterwards acquire. As one of such conditions, the court may require him to consent to judgment being entered against him by the receiver or trustee for any balance of the debts provable under the bankruptcy, which is not satisfied at the time of the discharge. An order of discharge releases the bankrupt from all debts provable under the bankruptcy, except those which he incurred by means of any fraud or breach of trust, and those of which he obtained forbearance by means of fraud; and also except debts due on recognizances, and debts due to the crown, or relating to the revenue; but of these last he may be discharged if the commissioners of the treasury certify their consent in writing to such discharge. If the bankrupt fails to obtain an order of discharge, then if he obtains credit to the extent of £20 or upwards from any person, without informing such person that he is an undischarged bankrupt, he is guilty of a misdemeanor. He is also subject to many political disqualifications. But an adjudication of bankruptcy may be annulled where it is proved to the court that the debtor ought not to have been adjudged bankrupt, or that his debts are paid in full.]^a

^a Other important methods of obtaining title from a failing debtor, are by agreements for a composition, and by assignment. A "composition" is a voluntary arrangement, made by a debtor with his creditors, in which they agree to accept a part payment in full satisfaction of their claims, and to grant the debtor a complete discharge. This is commonly made by deed, termed a "composition deed;" but when the indebtedness arises out of simple contract, it may be made orally, or by instrument not under seal. The composition must be founded upon a sufficient consideration. If it be made with a single creditor, his agreement to accept a less sum than the whole claim, in full satisfaction, is not sufficient, but there must be some independent consideration, such as the payment of a sum of money by a third person, or a

CHAPTER XXXI.

[BL. COMM.—BOOK II. CH. XXXII.]

Of Title by Testament and Administration.

THERE yet remains to be examined, in the present chapter, two other methods of acquiring personal estates, viz. by *testament* and *administration*. And these I propose to consider in one and the same view; they being in their nature so connected and blended together, as makes it impossible to treat of them distinctly, without manifest tautology and repetition.

XI., XII. In the pursuit, then, of this joint-subject, I shall, first, inquire into the original and antiquity of testaments and administrations; shall, secondly, show who is capable of making a last will and testament; shall, thirdly, consider the nature of a testament and its incidents; shall, fourthly, show what an executor and administrator are, and how they are to be appointed; and, lastly, shall select some few of the general heads of the office and duty of executors and administrators.

First, as to the *original* of testaments and administrations. We have more than once observed, that when property came to be vested in individuals by the right of occupancy, it became necessary for the peace of society, that this occupancy should be stipulation by the debtor to pay the smaller sum, at a time or in a manner more beneficial to the creditor than the payment of the full amount, according to the terms originally agreed upon. But when the engagement is made with several creditors, their mutual promises to accept a percentage in liquidation of their demands will constitute a sufficient consideration. (*White v. Kuntz*, 107 N. Y. 518, 524; see 1 *Hilton*, 515.) The composition deed need not be in any particular form. It may contain any stipulations, not invalid upon other legal grounds, upon which the parties may agree. Thus, it is sometimes provided that the composition shall be valid and obligatory only in case all the creditors enter into the compromise; and if, in such a case, any of the creditors refuse, the composition is not binding. (143 Mass. 42; 100 Pa. St. 159; 14 N. Y. 322.) It is not, however, requisite, irrespective of such an agreement, that all the creditors should enter into the compromise, and as many will be bound as do become parties to the composition deed. The terms and conditions of the deed must be strictly complied with by the debtor, to be a bar to an action by the creditor to recover the full claim (*Clarke v. White*, 12 Peters, 178); and unless the reduced amount agreed upon be paid on the day appointed, the original debt is revived. (*Penniman v. Elliott*, 27 Barb. 315.) After a composition is entered into, any secret arrangement, giving a preference to any one of the creditors contrary to the terms of

continued, not only in the present possessor, but in those persons to whom he should think proper to transfer it ; which introduced *490] the doctrine and practice of alienations, *gifts, and contracts. But these precautions would be very short and imperfect, if they were confined to the life only of the occupier ; for then, upon his death, all his goods would again become common, and create an infinite variety of strife and confusion. The law of very many societies has therefore given to the proprietor a right of continuing his property after his death, in such persons as he shall name ; and, in defect of such appointment or nomination, or where no nomination is permitted, the law of every society has directed the goods to be vested in certain particular individuals, exclusive of all other persons. The former method of acquiring personal property, according to the express directions of the deceased, we call a *testament*: the latter, which is also according to the will of the deceased, not expressed indeed, but presumed by the law, we call in England an *administration* ; being the same which the civil lawyers term a succession *ab intestato*, and which answers to the descent or inheritance of real estates.

Testaments are of very high antiquity. We find them in use among the ancient Hebrews ; though I hardly think the example usually given of Abraham's complaining that, unless he had some children of his body, his steward Eliezer of Damascus would be his heir, is quite conclusive to show that he had made him so by *will*. And, indeed, a learned writer has adduced this very

the deed, is fraudulent and invalid. (*Lawrence v. Clark*, 36 N. Y. 128 ; *Bliss v. Matteson*, 45 N. Y. 22 ; *Baldwin v. Rosenman*, 49 Conn. 105.) No securities, given in accordance with such an underhand arrangement, will be enforceable. The principles upon which the validity of composition agreements is based, are substantially the same as those upon which the doctrine of accord and satisfaction depends.

The other method of securing a division of the debtor's assets among his creditors, is by an *assignment in trust for the benefit of creditors*. The assignee becomes a trustee, and is under the ordinary duties and responsibilities of trustees, and is held to a faithful discharge of his trust. The method of making an assignment, and of distributing the assets, is frequently regulated by statute in the various States. Preferential assignments, by which the claims of certain creditors are preferred to others, are generally held allowable, unless prohibited by the provisions of a bankrupt or insolvent law or other statute. The last U. S. bankrupt law forbade such preferences, when made within a specified time before the petition in bankruptcy, but this statute is now repealed. (See note I, *ante*.)

passage to prove, that, in the patriarchal age, on failure of children, or kindred, the servants born under their master's roof succeeded to the inheritance as heirs-at-law. But (to omit what Eusebius and others have related of Noah's testament, made in *writing* and witnessed under his *seal*, whereby he disposed of the whole world) I apprehend that a much more authentic instance of the early use of testaments may be found in the Sacred writings, wherein Jacob bequeaths to his son Joseph a portion of his inheritance double to that of his brethren : which will we [*491 find carried into execution many hundred years afterwards, when the posterity of Joseph were divided into two distinct tribes, those of Ephraim and Manasseh, and had two several inheritances assigned them ; whereas the descendants of each of the other patriarchs formed only one single tribe, and had only one lot of inheritance. Solon was the first legislator that introduced wills into Athens ; but in many other parts of Greece they were totally discountenanced. In Rome they were unknown, till the laws of the twelve tables were compiled, which first gave the right of bequeathing : and, among the Northern nations, particularly among the Germans, testaments were not received into use. And this variety may serve to evince, that the right of making wills, and disposing of property after death, is merely a creature of the civil state ; which has permitted it in some countries and denied it in others : and, even where it is permitted by law, it is subjected to different formalities and restrictions in almost every nation under heaven.

With us in England, this power of bequeathing is coeval with the first rudiments of the law : for we have no traces or memorials of any time when it did not exist. Mention is made of intestacy, in the old law before the Conquest, as being merely accidental ; and the distribution of the intestate's estate, after payment of the lord's heriot, is then directed to go according to the established law. "*Sive quis incuria, sive morte repentina, fuerit intestatus mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debetur hereoti nomine) sibi assumito. Verum possessiones uxori, liberis, et cognatione proximis, pro suo cuique jure, distribuuntur.*" But we are not to imagine, that this power of bequeathing extended originally to *all* a man's personal estate. On the contrary, Glanvil will inform us, that by common law, *as it stood in the reign of Henry the Second, a [*492

man's goods were to be divided into three equal parts : of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal : or, if he died without a wife, he might then dispose of one moiety, and the other went to his children ; and so *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other ; but if he died without either wife or issue, the whole was at his own disposal. The shares of the wife and children were called their *reasonable* parts ; and the writ *de rationabili parte bonorum* was given to recover them.

This continued to be the law of the land at the time of *magna charta*, which provides, that the king's debts shall first of all be levied, and then the residue of the goods shall go to the executor to perform the will of the deceased ; and, if nothing be owing to the crown, "*omnia catalla cedant defuncto ; salvis uxori ipsius et pueris suis rationabilibus partibus suis.*" In the reign of King Edward the Third, this right of the wife and children was still held to be the universal or common law ; though frequently pleaded as the local custom of Berks, Devon, and other counties : and Sir Henry Finch lays it down expressly, in the reign of Charles the First, to be the general law of the land. But this law is at present altered by imperceptible degrees, and the deceased may now, by will, bequeath the whole of his goods and chattels ; though we cannot trace out when first this alteration began. Indeed, Sir Edward Coke is of opinion, that this never *493] was *the general law, but only obtained in particular places, by special custom : and to establish that doctrine, he relies on a passage in Bracton, which, in truth, when compared with the context, makes directly against his opinion. For Bracton lays down the doctrine of the reasonable part to be the common law ; but mentions that as a particular exception, which Sir Edward Coke has hastily cited for the general rule. And Glanvil, *magna charta*, Fleta, the year-books, Fitzherbert, and Finch, do all agree with Bracton, that this right to the *pars rationabilis* was by the common law : which also continues to this day to be the general law of our sister kingdom of Scotland. To which we may add, that, whatever may have been the custom of later years in many parts of the kingdom, or however it was introduced in derogation of the old common law, the ancient method continued in use in the province of York, the principality of Wales, and in

the city of London, till very modern times : when, in order to favor the power of bequeathing, and to reduce the whole kingdom to the same standard, three statutes have been provided : the one 4 & 5 Wm. & M., ch. 2, explained by 2 & 3 Ann., ch. 5, for the province of York ; another 7 & 8 W. III., ch. 38, for Wales ; and a third, 11 Geo. I., ch. 18, for London : whereby it is enacted, that persons within those districts, and liable to those customs, may (if they think proper) dispose of *all* their personal estates by will ; and the claims of the widow, children, and other relations, to the contrary, are totally barred. Thus is the old common law now utterly abolished throughout all the kingdom of England, and a man may devise the whole of his chattels as freely as he formerly could his third part or moiety. In disposing of which, he was bound by the custom of many places (as was stated in a former chapter) to remember his lord and the church, by leaving them his two best chattels, which was the original of heriots and mortuaries ; and afterwards he was left at his own liberty, to bequeath the remainder as he pleased.

*In case a person made no disposition of such of his [*494 goods as were testable, whether that were only part or the whole of them, he was, and is, said to die intestate ; and in such cases it is said, that by the old law the king was entitled to seize upon his goods, as the *parens patriæ*, and general trustee of the kingdom. This prerogative the king continued to exercise for some time by his own ministers of justice ; and probably in the county court, where matters of all kinds were determined : and it was granted as a franchise to many lords of manors, and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts baron, and other courts, or to have their wills there proved, in case they made any disposition. Afterwards, the crown, in favor of the church, invested the prelates with this branch of the prerogative ; which was done, saith Perkins, because it was intended by the law, that spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased. The goods, therefore, of intestates were given to the ordinary by the crown ; and he might seize them, and keep them without wasting, and also might give, aliene, or sell them at his will, and dispose of the money *in pios usus* : and, if he did otherwise, he broke the confidence which

the law reposed in him. So that, properly, the whole interest and power which were granted to the ordinary, were only those of being the king's almoner within his diocese; in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious. And, as he had thus the disposition of intestates' effects, the probate of wills of course followed: for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.

*495] *The goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the reverend prelates were, therefore, not accountable to any, but to God and themselves, for their conduct. But even in Fleta's time it was complained "*quod ordinarii, hujusmodi bona nomine ecclesiæ occupantes nullam vel saltem indebitam faciunt distributionem.*" And to what a length of iniquity this abuse was carried, most evidently appears from a gloss of Pope Innocent IV., written about the year 1250; wherein he lays it down for established canon law, that "*in Britannia tertia pars bonorum decedentium ab intestato in opus ecclesiæ et pauperum dispensanda est.*" Thus, the popish clergy took to themselves (under the name of the church and poor) the whole residue of the deceased's estate, after the *partes rationabiles*, or two thirds, of the wife and children were deducted; without paying even his lawful debts, or other charges thereon. For which reason, it was enacted by the statute of Westm. 2, that the ordinary shall be bound to pay the debts of the intestate so far as his goods will extend, in the same manner that executors were bound in case the deceased had left a will: a use more truly pious, than any *requiem*, or mass for his soul. This was the first check given to that exorbitant power, which the law had entrusted with ordinaries. But, though they were now made liable to the creditors of the intestate for their just and lawful demands; yet the *residuum*, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their

immediate *dependents: and therefore the statute 31 [*496 Edw. III., ch. 11, provides, that, in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods; which administrators are put upon the same footing, with regard to suits and to accounting, as executors appointed by will. This is the original of administrators, as they at present stand; who are only the officers of the ordinary, appointed by him in pursuance of this statute, which singles out the *next and most lawful friend* of the intestate; who is interpreted to be the *next of blood* that is under no legal disabilities. The statute 21, Hen. VIII., ch. 5, enlarges a little more the power of the ecclesiastical judge; and permits him to grant administration *either* to the widow, *or* the next of kin, *or* to both of them, at his own discretion; and where two or more persons are in the same degree of kindred, gives the ordinary his election to accept which ever he pleases.

Upon this footing stands the general law of administrations at this day.¹ I shall, in the farther progress of this chapter, mention a few more particulars, with regard to who may, and who may not, be administrator; and what he is bound to do when he has taken this charge upon him: what has been hitherto remarked only serving to show the original and gradual progress of testaments and administrations; in what manner the latter was first of all vested in the bishops by the royal indulgence; and how it was afterwards, by authority of parliament, taken from them in effect, by obliging them to commit all their power to particular persons nominated expressly by the law.

¹ "Thus stood the general law of probate and administration till the year 1857, when the Probate Act was passed. That act abolished the jurisdiction of the ecclesiastical and all other courts then existing to grant probate of wills, or letters of administration of the personal estates of intestates. A new court was established, called the Court of Probate, which now exclusively exercises, in the name of Her Majesty, every jurisdiction, and performs all duties relating to the personal estates of deceased persons, formerly exercised or performed by the ordinaries, or other courts; with, however, this exception, as to jurisdiction, that no suits for legacies, or for distribution of residue, are to be entertained. The act abolished the jurisdiction of the old ecclesiastical and other courts, but did not confer upon the new court any jurisdiction over the administration of the estates; which, indeed, is one of the chief functions of the Court of Chancery." (Broom & Hadley's Comm., ii 639; see *ante*, p. 142, n. 2, *post*, p. 651, n. 9.)

In the United States similar jurisdiction is conferred upon special courts,

I proceed now, *secondly*, to inquire who may, or may not, make a testament ; or what persons are absolutely obliged by law to die intestate. And this law is entirely prohibitory ; for, regularly, every person hath full power and liberty to make a will, that is not under some special prohibition by law or custom: *497] which prohibitions are principally upon three *accounts: for want of sufficient discretion ; for want of sufficient liberty and free will ; and on account of their criminal conduct.

1. In the first species are to be reckoned infants, under the age of fourteen if males, and twelve if females ; which is the rule of the civil law.² For, though some of our common lawyers have held that an infant of any age (even four years old) might make a testament, and others have denied that under eighteen he is capable, yet, as the ecclesiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclesiastical law. So that no objection can be admitted to the will of an infant of fourteen, merely for want of age : but, if the testator was not of sufficient discretion, whether at the age of fourteen or four-and twenty, that will overthrow his testament. Madmen, or otherwise *non compotes*, idiots or natural fools, persons grown childish by reason of old age or distemper, such as have their senses besotted with drunkenness,—all these are incapable, by reason of mental disability, to make any will so long as such disability lasts.³ To this class also may be referred such

which are termed “probate” or “surrogate” courts, etc. Their jurisdiction is generally limited to the county in which they are established.

² By the present English law, a person must be twenty-one years of age, in order to make a valid will, either of real or personal property.

In the United States, the rule of the common-law, as stated in the text, is still in force, unless changed by statute. But, in some States, statutes have been passed, making 21 years the requisite age for wills of realty or personalty. In New York, a male must be eighteen years old, and a female sixteen, in order to make a valid will of personal estate.

³ To be capable of making a will, the testator must be possessed of a sound and disposing mind and memory, so as to be able to make a testamentary disposition with sense and judgment, in reference to the situation and amount of his property, and the claims of those who are or might be the objects of his bounty. (*Clark v. Fisher*, 1 Paige, 171 ; *Horn v. Pullman*, 72 N. Y. 269 ; and see 66 N. Y. 144.) But mental derangement may exist, and yet not be so pronounced or extreme as to destroy testamentary capacity. For it is, in general, sufficient that the testator should be able to comprehend the state of his affairs with reasonable exactness, to understand the nature and con-

persons as are *born* deaf, blind, and dumb; who, as they have always wanted the common inlets of understanding, are incapable of having *animus testandi*, and their testaments are therefore void.⁴

2. Such persons as are intestable for want of liberty or freedom of will, are by the civil law, of various kinds; as prisoners, captives, and the like. But the law of England does not make such persons absolutely intestable; but only leaves it to the discretion of the court to judge, upon the consideration of their particular circumstances of duress, whether or no such person could be supposed to have *liberum animus testandi*. And, with regard to feme-coverts, our law differs still more materially from the civil. Among the Romans there was no distinction; a married woman was as capable of bequeathing as a feme-sole. But with us a *married woman is not only utterly incapable of devising [*498 *lands*, being excepted out of the statute of wills, 34 & 35 Hen. VIII., ch. 5, but also she is incapable of making a testament of *chattels*, without the license of her husband. For all her personal chattels are absolutely his; and he may dispose of her chattels real, or shall have them to himself if he survives her: it would be therefore extremely inconsistent, to give her a power of defeating that provision of the law, by bequeathing those chattels to another. Yet by her husband's license she may make a testament; and the husband, upon marriage, frequently covenants with her friends to allow her that license: but such license is more properly his assent; for unless it be given to the particular will in question, it will not be a complete testament, even though the husband beforehand hath given her permission to make a will. Yet it shall be sufficient to repel the husband from his general right of administering his wife's effects; and administration shall

dition of his property, the effect of the disposition which he intends to make, and his duty towards those dependent upon him; but he must act voluntarily, and not under undue influence, duress, or fraudulent deception. (See *Van Guysling v. Van Kuren*, 35 N. Y. 70; *Marx v. McGlynn*, 88 N. Y. 357; also 127 Pa. St. 564; 45 N. J. Eq. 173, 689, 708, 726; 136 Mass. 145; 76 Mich. 384; 33 N. Y. 619.) But neither habitual drunkenness, nor the actual stimulus of intoxicating liquors, at the time of executing the will, incapacitates a testator, unless the excitement be such as to disorder his faculties and pervert his judgment. (*Peck v. Cary*, 27 N. Y. 9; *Brown v. Torrey*, 24 Barb. 583; see 45 N. J. Eq. 702; 127 Pa. St. 269.)

⁴ This is now an entirely discarded doctrine.

be granted to her appointee, with such testamentary paper annexed. So that, in reality, the woman makes no will at all, but only something like a will; operating in the nature of an appointment, the execution of which the husband, by his bond, agreement, or covenant, is bound to allow. A distinction similar to which we meet with in the civil law. For though a son who was *in potestate parentis* could not by any means make a formal and legal testament, even though his father permitted it, yet he might, with the like permission of his father, make what was called a *donatio mortis causa*. The Queen consort is an exception to this general rule, for she may dispose of her chattels by will, without the consent of her lord: and any feme-covert may make her will of goods, which are in her possession *in auter droit* as executrix or administratrix; for these can never be the property of the husband: and, if she has any pin-money or separate maintenance, it is said she may dispose of her savings thereout *499] *by testament, without the control of her husband. But, if a feme-sole makes her will, and afterwards marries, such subsequent marriage is esteemed a revocation in law, and entirely vacates the will.⁵

3. Persons incapable of making testaments, on account of their criminal conduct, are, in the first place, all traitors and felons, from the time of conviction; for then their goods and chattels are no longer at their own disposal, but forfeited to the king. Neither can a *felo de se* make a will of goods and chattels, for they are forfeited by the act and manner of his death; but he may make a devise of his lands, for they are not subjected to any forfeiture. Outlaws also, though it be but for debt, are incapable of making a will, so long as the outlawry subsists, for their goods and chattels are forfeited during that time. As for persons guilty of other crimes, short of felony, who are by the civil law precluded from making testaments (as usurers, libellers and others of a worse stamp), by the common law their testaments may be good. And in general the rule is, and has been so at least ever since Glanvil's time, *quod libera sit cujuscunque ultima voluntas*.

⁵ It is the tendency of modern legislation to give to married women full power to dispose by will of their separate property, both real and personal. Statutes of this kind have been passed in nearly all the United States. But, so far as unchanged by statute, the common-law rule is still in force in this country. (See *ante*, p. 158, note 24; p. 499, note 1; p. 500, note 5.)

Let us next, *thirdly*, consider what this last will and testament is, which almost every one is thus at liberty to make ; or, what are the nature and incidents of a testament. Testaments, both Justinian and Sir Edward Coke agree to be so called, because they are *testatio mentis* : an etymon which seems to savor too much of the conceit ; it being plainly a substantive derived from the verb *testari*, in like manner as *juramentum*, *incrementum*, and others, from other verbs. The definition of the old Roman lawyers is much better than their etymology ; "*voluntatis nostræ justa sententia de eo, quod quis post mortem suam fieri velit* : " which may be thus rendered into English, "the legal declaration of a man's intentions, *which he wills to be performed [*500 after his death." It is called *sententia*, to denote the circumspection and prudence with which it is supposed to be made : it is *voluntatis nostræ sententia*, because its efficacy depends on its declaring the testator's intention, whence in England it is emphatically styled his *will* : it is *justa sententia* ; that is, drawn, attested, and published, with all due solemnities and forms of law : it is *de eo, quod quis post mortem suam fieri velit*, because a testament is of no force till after the death of the testator.

These testaments are divided into two sorts: *written*, and *verbal* or *nuncupative* ; of which the former is committed to writing, the latter depends merely upon oral evidence, being declared by the testator *in extremis* before a sufficient number of witnesses, and afterwards reduced to writing. A *codicil*, *codicillus*, a little book or writing, is a supplement to a will, or an addition made by the testator, and annexed to, and to be taken as part of, a testament ; being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former disposition of the testator. This may also be either written or nuncupative.

But, as *nuncupative* wills and codicils (which were formerly more in use than at present, when the art of writing is become more universal) are liable to great impositions, and may occasion many perjuries, the statute of frauds, 29 Car. II., ch. 3, hath laid them under many restrictions ; except when made by mariners at sea, and soldiers in actual service. As to all other persons, it enacts : 1. that no written will shall be revoked or altered by a subsequent nuncupative one, except the same be in the lifetime of the testator reduced to writing, and read over to him, and ap-

proved, and unless the same be proved to have been so done by the oaths of three witnesses at the least; who, by statute 4 & 5 Ann., ch. 16, must be such as are admissible upon trials at common law. 2. That no nuncupative will shall in anywise be good, where the estate bequeathed exceeds 30*l.*, unless proved by three such witnesses, present at the making thereof (the Roman law requiring seven), and unless they or some of them were specially *501] required to bear *witness thereto by the testator himself; and unless it was made in his last sickness, in his own habitation or dwelling-house, or where he had been previously resident ten days at the least, except he be surprised with sickness on a journey, or from home, and dies without returning to his dwelling. 3. That no nuncupative will shall be proved by the witnesses after six months from the making, unless it were put in writing within six days. Nor shall it be proved till fourteen days after the death of the testator, nor till process hath first issued to call in the widow, or next of kin, to contest it, if they think proper. Thus hath the legislature provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself has fallen into disuse; and is hardly ever heard of, but in the only instance where favor ought to be shown to it, when the testator is surprised by sudden and violent sickness. The testamentary words must be spoken with an intent to bequeath, not any loose idle discourse in his illness; for he must require the by-standers to bear witness of such his intention: the will must be made at home, or among his family or friends, unless by unavoidable accidents; to prevent impositions from strangers: it must be in his *last* sickness; for, if he recovers, he may alter his dispositions, and has time to make a written will: it must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses; nor yet too hastily and without notice, lest the family of the testator should be put to inconvenience, or surprised.⁶

As to *written* wills, they need not any witness of their publication. I speak not here of devises of lands, which are quite of

⁶ The statute 1 Vict., ch. 26, finally did away with nuncupative wills, except in the case of soldiers in actual service, and mariners or seamen at sea, who may still dispose of their personal estate in this manner. This is also the established rule in New York and many other States. In some States, moreover, a person may make such a will during his last sickness at home, or during a sudden illness away from home of which he dies. (Stimson's Amer. Stat. Law, §§ 2700-2705.)

a different nature ; being conveyances by statute, unknown to the feudal or common law, and not under the same jurisdiction as personal testaments. But a testament of chattels, written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication, is good ; provided sufficient proof can be had that it is his handwriting. And though *written in another man's hand, and never signed [*502 by the testator, yet, if proved to be according to his instructions and approved by him, it hath been held a good testament of the personal estate. Yet it is the safer and more prudent way, and leaves less in the breast of the ecclesiastical judge, if it be signed or sealed by the testator, and published in the presence of witnesses :⁷ which last was always required in the time of Bracton ; or, rather, he in this respect has implicitly copied the rule of the civil law.

No testament is of any effect till after the death of the testator. "*Nam omne testamentum morte consummatum est : et voluntas testatoris est ambulatoria usque ad mortem.*" And therefore, if there be many testaments, the last overthrows all the former :⁸ but the republication of a former will revokes one of a latter date, and establishes the first again.

Hence it follows, that testaments may be avoided three ways : 1. If made by a person laboring under any of the incapacities before mentioned : 2. By making another testament of a latter date : and, 3. By cancelling or revoking it. For, though I make a last will and testament irrevocable in the strongest words, yet I am at liberty to revoke it : because my own act or words cannot alter the disposition of law, so as to make that irrevocable which is in its own nature revocable. For this, saith Lord Bacon, would

⁷ By the present English law, every will must be attested by two or more witnesses. In the United States, a similar attestation is required, though the number of witnesses varies :—in some, two are required ; in others, three, etc. The formalities requisite to the execution of a will are prescribed by statute in the several States.

⁸ But a subsequent testament does not entirely avoid a former one, unless it contain an express clause of revocation, or equivalent expression of intention, or be manifestly inconsistent with the provisions of the one previously made. So far as the provisions of the successive instruments are consistent and reconcilable, they may stand together. (*Nelson v. McGiffert*, 3 Barb. Ch. 158 ; *Wilson v. Wilson*, 8 Cow. 56.) But if a will disposes of *all* a testator's property, it supersedes all former wills, though it contain no clause of revocation. (*Simmons v. Simmons*, 26 Barb. 68 ; see *ante*, p. 500, note 4.)

be for a man to deprive himself of that, which of all other things is most incident to human condition ; and that is, alteration or repentance. It hath also been held, that, without an express revocation, if a man, who hath made his will, afterwards marries and hath a child, this is a presumptive or implied revocation of his former will, which he made in his state of celibacy.⁹ The Romans were also wont to set aside testaments as being *inofficiosa*, deficient in natural duty, if they disinherited or totally passed by **503***] (without assigning a true and *sufficient reason) any of the children of the testator. But, if the child had any legacy, though ever so small, it was a proof that the testator had not lost his memory or his reason, which otherwise the law presumed ; but was then supposed to have acted thus for some substantial cause : and in such case no *querela inofficiosi testamenti* was allowed. Hence probably has arisen that groundless vulgar error, of the necessity of leaving the heir a shilling, or some other express legacy, in order to disinherit him effectually : whereas the law of England makes no such constrained suppositions of forgetfulness or insanity ; and therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficiosi*, to set aside such a testament.†

We are next to consider, *fourthly*, what is an executor, and what an administrator ; and how they are both to be appointed.

An executor is he to whom another man commits by will the execution of that his last will and testament. And all persons are capable of being executors, that are capable of making wills, and many others besides ; as feme-coverts and infants : nay, even infants unborn, or *in ventre sa mere* may be made executors. But no infant can act as such till the age of seventeen years ; till which time administration must be granted to some other, *durante minore ætate*. In like manner as it may be granted *durante absentia*, or *pendente lite* ; when the executor is out of the realm, or when a suit is commenced in the ecclesiastical court touching the validity of the will. This appointment of an executor is essential to the making of a will : and it may be performed either by express words, or such as strongly imply the same. But if the testator makes an incomplete will, without naming

⁹ See *ante*, p. 500, note 5.

† See *Spratt v. Spratt*, 76 Mich. 384. In many States of this country it is provided by statute that if a testator omit to provide for his children in his will, they shall take the same shares which they would have received, had he died intestate, unless it appears that the omission was intentional. Like statutes are in force as to posthumous children. (Stimson's Amer. Stat. Law, §§ 2842-2844.)

any executors, or if he names incapable persons, or if the executors named refuse to act: in any of these cases, the ordinary must *grant administration *cum testamento annexo* to [*504 some other person; and then the duty of the administrator, as also when he is constituted only *durante minore ætate*, &c., of another, is very little different from that of an executor. And this was law so early as the reign of Henry II.; when Glanvil informs us that "*testamenti executores esse debent ii, quos testator ad hoc elegerit, et quibus curam ipse commiserit; si vero testator nullos ad hoc nominaverit, possunt propinqui et consanguinei ipsius defuncti ad id faciendum se ingerere.*"

But if the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted by the ordinary to such administrator as the statutes of Edward the Third and Henry the Eighth, before mentioned, direct. In consequence of which we may observe;

1. That the ordinary is compellable to grant administration of the goods and chattels of the wife, to the husband or his representatives; and of the husband's effects, to the widow, or next of kin; but he may grant it to either, or both, at his discretion.
2. That, among the kindred, those are to be preferred that are the nearest in degree to the intestate; but of persons in equal degree, the ordinary may take which he pleases.
3. That this nearness or propinquity of degree shall be reckoned according to the computation of the civilians; and not of the canonists, which the law of England adopts in the descent of real estates; because, in the civil computation, the intestate himself is the *terminus, a quo* the several degrees are numbered; and not the common ancestor, according to the rule of the canonists. And therefore in the first place the children, or (on failure of children) the parents of the deceased, are entitled to the administration; both which are indeed in the first degree; but * with us the children [*505 are allowed the preference. Then follow brothers, grandfathers, uncles or nephews (and the females of each class respectively), and lastly, cousins.
4. The half blood is admitted to the administration, as well as the whole, for they are of the kindred of the intestate, and only excluded from inheritances of land upon feudal reasons. Therefore the brother of the half blood shall exclude the uncle of the whole blood; and the ordinary may grant administration to the sister of the half, or the brother of the whole

blood, at his own discretion. 5. If none of the kindred will take out administration, a creditor may, by custom, do it. 6. If the executor refuses, or dies intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin. 7. And lastly, the ordinary may, in defect of all these, commit administration (as he might have done before the statute of Edward III.) to such discreet person as he approves of; or may grant him letters *ad colligendum bona defuncti*, which neither makes him executor nor administrator; his only business being to keep the goods in his safe custody, and to do other acts for the benefit of such as are entitled to the property of the deceased. If a bastard, who has no kindred, being *nullius filius*, or any one else that has no kindred, dies intestate, and without wife or child, it hath formerly been held that the ordinary might seize his goods, and dispose of them *in pios usus*. But the usual course *506] now is for some one to procure * letters patent, or other authority from the king; and then the ordinary of course grants administration to such appointee of the crown.¹⁰

The interest vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor: so that the executor of A.'s executor is to all intents and purposes the executor and representative of A. himself;¹¹ but the executor of A.'s administrator, or the administrator of A.'s executor, is not the representative of A. For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence; but the administrator of A. is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all; and therefore, on the death of that officer, it results back to the ordinary to appoint another. And, with regard to the administrator of A.'s executor, he has clearly

¹⁰ There are statutes, in the several American States, declaring what classes of persons shall be capable of acting as executors or administrators, and providing for their appointment. But there is a general similarity between these provisions and the rules stated in the text.

¹¹ This rule has been changed by statute in a number of the American States, providing that no executor of an executor shall, as such, be authorized to administer on the estate of the first testator, but an administrator with the will annexed shall be appointed.

no privity or relation to A. ; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore, in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh, *of the goods* of the deceased *not* administered by the former executor or administrator. And this administrator *de bonis non*, is the only legal representative of the deceased in matters of personal property. But he may, as well as an original administrator, have only a *limited* or *special* administration committed to his care, *viz.*, of certain specific effects, such as a term of years, and the like ; the rest being committed to others.

* Having thus shown what is, and who may be, an ex- [*507 ecutor or administrator, I proceed now, *fifthly* and lastly, to inquire into some few of the principal points of their office and duty. These in general are very much the same in both executors and administrators ; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor : and secondly, that an executor may do many acts before he proves the will, but an administrator may do nothing till letters of administration, are issued ; for the former derives his power from the will and not from the probate ; the latter owes his entirely to the appointment of the ordinary. If a stranger takes upon him to act as executor, without any just authority (as by intermeddling with the goods of the deceased and many other transactions), he is called in law an executor of his own wrong (*de son tort*), and is liable to all the trouble of an executorship, without any of the profits or advantages ; but merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse of the deceased, will not amount to such an intermeddling as will charge a man as executor of his own wrong. Such a one cannot bring an action himself in right of the deceased, but actions may be brought against him. And, in all actions by creditors against such an officious intruder, he shall be named an executor, generally ; for the most obvious conclusion which strangers can form from his conduct, is, that he hath a will of the deceased, wherein he is named executor, but hath not yet taken probate thereof. He is charge-

able with the debts of the deceased, so far as assets come to his hands ; and, as against creditors in general, shall be allowed all payments made to any other creditor in the same or a superior *508] degree, *himself only excepted. And though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages ; unless, perhaps, upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt. But let us now see what are the power and duty of a rightful executor or administrator.

1. He must *bury* the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expenses are allowed, previous to all other debts and charges ; but if the executor or administrator be extravagant, it is a species of *devastation* or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased.

2. The executor, or the administrator *durante minore ætate*, or *durante absentia*, or *cum testamento annexo*, must *prove the will* of the deceased : which is done either in *common form*, which is only upon his own oath before the ordinary, or his surrogate ; or *per testes*, in more solemn form of law, in case the validity of the will be disputed. When the will is so proved, the original must be deposited in the registry of the ordinary ; and a copy thereof in parchment is made out under the seal of the ordinary, and delivered to the executor or administrator, together with a certificate of its having been proved before him ; all which together is usually styled the *probate*. In defect of any will, the person entitled to be administrator must also, at this period, take out letters of administration under the seal of the ordinary ; whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him ; and he must, by statute 22 & 23 Car. II., ch. 10, enter into a bond with sureties, faithfully to execute his trust.

* * * * *

3. The executor or administrator is to make an *inventory* of all the goods and chattels, whether in possession or action, of the deceased ; which he is to deliver in to the ordinary upon oath, if thereunto lawfully required.

4. He is to *collect* all the goods and chattels so inventoried ;

and to that end he has very large powers and interests conferred on him by law; being the representative of the deceased, and having the same property in his goods as the principal had when living, and the same remedies to recover them. And if there be two or more executors, a sale or release by one of them shall be good against all the rest: but in case of administrators it is otherwise.¹² Whatever is so recovered, that is of a saleable nature and may be converted into ready money, is called *assets* in the hands of the executor or administrator; that is sufficient or enough (from the French *assez*) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. * Whatever assets so come to his hands he may convert [*511 into ready money, to answer the demands that may be made upon him; which is the next thing to be considered: for,

5. The executor or administrator must *pay* the *debts* of the deceased. In payment of debts he must observe the rules of priority: otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he may pay all funeral charges, and the expense of proving the will, and the like. Secondly, debts due to the king on record or specialty. Thirdly, such debts as are by particular statutes to be preferred to all others: as the forfeitures for not burying in woollen, money due upon poor rates, for letters to the post office, and some others. Fourthly, debts of record; as judgments (docketed according to the statute 4 & 5 Wm. & M., ch. 20), statutes and recognizances. Fifthly, debts due on special contracts; as for rent (for which the lessor has often a better remedy in his own hands by distraining), or upon bonds, covenants, and the like, under seal. Lastly, debts on simple contracts, viz. upon notes unsealed, and verbal promises.¹⁸ Among these simple contracts, servants' wages are by

¹² This is no longer the general rule, but one administrator is deemed to possess the power of all.

¹⁸ By a recent English statute, it is provided that all contract debts, whether they arise by specialty or simple contract, are to be treated as of equal degree. (32 & 33 Vict., ch. 46.)

In the United States, the administration of the estates of deceased persons is commonly made a matter of statutory regulation; and, in many of the States, the provisions regulating the duties of executors and administrators are very comprehensive and minute. These provisions bear a general resemblance to those of the English law stated in the text, which, therefore,

some with reason preferred to any other: and so stood the ancient law, according to Bracton and Fleta, who reckon among the first debts to be paid, *servitia servientium et stipendia famulorum*. Among debts of equal degree, the executor or administrator is allowed to pay himself first, by retaining in his hands so much as his debt amounts to. But an executor of his own wrong is not allowed to retain; for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased; and would besides be taking advantage of his own *512] wrong, which is contrary to the rule of law. If a *creditor constitutes his debtor his executor, this is a release or discharge of the debt, whether the executor acts or no: provided there be assets sufficient to pay the testator's debts: for though this discharge of the debt shall take place of all legacies, yet it were unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary. Also, if no suit is commenced against him, the executor may pay any one creditor in equal degree his whole debt, though he has nothing left for the rest: for, without a suit commenced, the executor has no legal notice of the debt.¹⁴

afford a sufficiently adequate statement of the fundamental principles in this branch of the law, in American as well as in English jurisprudence. In these statutes, priority is also given to claims of certain kinds in the payment of debts. Thus, in New York, it is provided that the debts of the deceased shall be paid in the following order: (1) Debts entitled to a preference under the laws of the United States. (2) Taxes assessed upon the estate of the deceased. (3) Judgments docketed and decrees enrolled against the deceased, according to the priority thereof, respectively. (4) All recognizances, bonds, sealed instruments, notes, bills, and unliquidated demands and accounts. (2 R. S. 87, § 27.) The statutes of other States are quite similar to this. (See *Croswell on Exors. and Admsrs.* §§ 396-404.)

¹⁴ In many of the American States, these rules have been changed by statute. Thus, in New York, it is provided that the claim of an executor or administrator shall not be entitled to any preference over others of the same class; and claims against an executor are not discharged by his appointment as such, but are to be deemed part of the assets, to be used in the payment of debts and legacies, and distributed among the next of kin. So a bequest in a will of any debt or demand due to the testator by the executor, is invalid as against creditors. Claims against the deceased are required to be presented within six months after the publication of a notice to that effect, and if allowed are paid ratably, if of the same class. But if any claim is not presented within this time, the executor or administrator may use the residue of assets to pay legacies and distributive shares, and will not be chargeable therefor to such creditor. (2 R. S. 88, § 33; 84, § 13; 89, §§ 34-39; for the law of other States, see *Croswell on Exors. and Admsrs.*)

6. When the debts are all discharged, the *legacies* claim the next regard; which are to be paid by the executor so far as his assets will extend; but he may not give himself the preference herein, as in the case of debts.

A legacy is a bequest, or gift, of goods and chattels by testament; and the person to whom it was given is styled the legatee: which every person is capable of being, unless particularly disabled by the common law or statutes, as traitors, papists,¹⁵ and some others. This bequest transfers an inchoate property to the legatee; but the legacy is not perfect without the assent of the executor: for if I have a *general* or *pecuniary* legacy of 100*l.*, or a *specific* one of a piece of plate, I cannot in either case take it without the consent of the executor. For in him all the chattels are vested; and it is his business first of all to see whether there is a sufficient fund left to pay the debts of the testator: the rule of equity being, that a man must be just, before he is permitted to be generous; or, as Bracton expresses the sense of our ancient law, "*de bonis defuncti primo deducenda sunt ea quæ sunt necessitatis, et postea quæ sunt utilitatis, et ultimo quæ sunt voluntatis.*" And in case of a deficiency of assets, all the *general* legacies must abate proportionably, in order to pay the debts; *but a *specific* legacy (of a piece of plate, a horse, or the [*513 like) is not to abate at all, or allow any thing by way of abatement, unless there be not sufficient without it. Upon the same principle, if the legatees had been paid their legacies, they are afterwards bound to refund a ratable part, in case debts come in, more than sufficient to exhaust the *residuum* after the legacies paid. And this law is as old as Bracton, and Fleta, who tells us "*si plura sint debita, vel plus legatum fuerit, ad quæ catalla defuncti non sufficiant, fiat ubique defalcatio, excepto regis privilegio.*"¹⁶

¹⁵ This disability is now removed.

¹⁶ Legacies are classified as *general*, *specific*, and *demonstrative*. A general legacy is the bequest of a sum of money or article of property, in general terms, without designating any particular fund or chattel as the subject of the gift. A specific legacy is the bequest of a particular article of property, specially designated. (41 N. H. 391; 45 N. J. Eq. 461; 8 App. Cas. 812; 28 N. Y. 61; 128 Mass. 433; 7 Johns. Ch. 258.) A demonstrative legacy is the bequest of a certain amount of money, to be paid out of a particular fund. (*Tift v. Porter*, 8 N. Y. 516; *Giddings v. Seward*, 16 N. Y. 365.) Thus, the bequest of a sum of money, the amount being stated, or of a horse, of a library, of cloth-

If a legatee dies before the testator, the legacy is a *lost or lapsed* legacy, and shall sink into the *residuum*. And if a *contingent* legacy be left to any one, as *when* he attains, or *if* he attains, or of any chattel, thus indefinitely described, would be a general legacy. But if the will specified a particular horse owned by the testator, a library in a particular room or book-case, a sum of money in a designated receptacle, the legacy would be specific. If the legacy of a chattel, as a horse, were general, and the testator owned no such property, the executor would be bound to purchase such a chattel, if there were sufficient assets. But if the legacy were specific, it would fail, if the testator had not the property described. An illustration of a demonstrative legacy would be a bequest of \$400, to be paid from the proceeds of the sale of certain property. General legacies are also termed "pecuniary," but the designation is inaccurate, since specific legacies may be pecuniary; while general legacies are not so necessarily, as the examples already given sufficiently indicate. This distinction between legacies is important, with regard to the doctrine of *abatement*. This term denotes a proportional reduction of the bequests to various legatees, in case of deficiency of assets. After the payment of debts, if the residue of assets is not sufficient to discharge all the legacies, the specific legacies will be first paid, then the demonstrative, and afterwards the general legacies, until the amount of assets is exhausted. If the legacies in any class cannot be paid fully, they will abate proportionally; but specific legacies may be paid in full, although the general legatees receive nothing. Sometimes, however, certain general legacies are preferred to others of the same class, because they are founded upon a valuable consideration; as, where a general legacy is given in discharge of a debt, or to a widow in lieu of dower, etc. (*Bliven v. Seymour*, 88 N. Y. 469.) If there be any assets remaining, after the general legacies are fully paid, they will pass to the residuary legatee, if there be one named by the will, or will be distributed among the next of kin.

Legacies are also subject to *ademption*, as it is termed. As applied to specific legacies, this denotes an extinguishment or destruction of the legacy, by reason of some change or loss of the property bequeathed, or its non-existence. Thus, if the testator had no article of property corresponding with that named in a specific legacy, the legacy would fail, and there would be no claim against the estate. The same would be true, if the identity of the article were changed after the making of the will; as if a particular gold cup were bequeathed, and the testator had it made into jewelry, or a piece of cloth into a garment. (*Beck v. McGillis*, 9 Barb. 35; *Newcomb v. St. Peter's Church*, 2 Sandf. Ch. 636.) The rule in relation to demonstrative legacies is different. For, if the fund out of which payment is to be made fails, such a legacy will rank among the general legacies. (*Florence v. Sands*, 4 Redf. 206.) Ademption, as applied to general legacies, has a somewhat different meaning; being used to denote the substitution of some other provision for the person named as legatee, which is deemed a satisfaction of the legacy. This doctrine is applied in courts of equity when a parent bequeaths a legacy to a child or grandchild and subsequently, before his death, makes a pro-

tains, the age of twenty-one, and he dies before that time, it is a lapsed legacy. But a legacy to one, *to be paid* when he attains the age of twenty-one years, is a *vested* legacy; an interest which commences *in præsentî*, although it be *solvendum in futuro*: and if the legatee dies before that age, his representative shall receive it out of the testator's personal estate at the same time that it would have become payable, in case the legatee had lived. This distinction is borrowed from the civil law; and its adoption in our courts is not so much owing to its intrinsic equity, as to its having been before adopted by the ecclesiastical courts. For since the chancery has a concurrent jurisdiction with them, in regard to the recovery of legacies, it was reasonable that there should be a conformity in their determinations; and that the subject should have the same measure of justice in whatever court he sued. * But, if such legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir; for, with regard to devises affecting lands, the ecclesiastical court hath no concurrent jurisdiction.¹⁷ And, in case of a vested legacy, due immediately, and charged on land or money in the funds which yield an immediate profit, *interest shall be pay- [*514 able thereon from the testator's death; but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator.¹⁸

vision for the same legatee, without expressing it to be in satisfaction of the legacy. If this be equal or greater in amount than the legacy, be certain and not contingent, it will operate to discharge or extinguish the legacy. This is considered as the presumed intention of the testator. (*Langdon v. Astor's Exors.*, 16 N. Y. 9, 34; *Hine v. Hine*, 39 Barb. 507; see 15 Pick. 133.)

¹⁷ By the English Statute of Wills (1 Vict., ch. 26), the real estate comprised in a lapsed devise shall, unless a contrary intention appears in the will, pass to the residuary devisee, if any there be, in preference to the heir-at-law. It is also provided, that a devise or legacy to a child or other descendant shall not lapse, if issue of the devisee or legatee survives the testator, but shall take effect, as if the devisee or legatee had died immediately after the testator, unless a contrary intention appears by the will. Provisions similar to these have also been made by statute in many American States. (Stimson's Amer. Stat. Law, §§ 2822, 2823; see 113 N. Y. 115, 337; 123 Mass. 102.)

¹⁸ It is a general rule, in this country as well as in England, that interest is to be reckoned upon the amount of the legacy, from the end of a year after the testator's death. But there are certain exceptional instances, in which interest is estimated from the time of decease; as when a legacy is given in payment of a debt due; or is given by a parent to his child by way of maintenance, or by a husband to his wife in lieu of dower, etc. (*Cooke v.*

Besides these formal legacies, contained in a man's will and testament, there is also permitted another death-bed disposition of property; which is called a donation *causa mortis*.¹⁹ And that is, when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods (under which have been included bonds, and bills drawn by the deceased upon his banker), to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor: yet it shall not prevail against creditors; and is accompanied with this implied trust, that, if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death, or *mortis causa*. This method of donation might have subsisted in a state of nature, being always accompanied with delivery of actual possession; and so far differs from a testamentary disposition, but seems to have been handed to us from the civil lawyers, who themselves borrowed it from the Greeks.

7. When all the debts and particular legacies are discharged, the surplus or *residuum* must be paid to the residuary legatee, if any be appointed by the will; and if there be none, it was long a settled notion that it devolved to the executor's own use, by virtue of his executorship. But whatever ground there might have been formerly for this opinion, it seems now to be understood with this restriction; that, although where the executor has no legacy at all, the *residuum* shall in general be his own,²⁰ *515] yet wherever there is sufficient *on the face of a will (by means of a competent legacy or otherwise), to imply that the testator intended his executor should *not* have the residue, the undevised surplus of the estate shall go to the next of kin, the executor then standing upon exactly the same footing as an administrator, concerning whom indeed there formerly was much debate, whether or no he could be compelled to make any distribution of the intestate's estate. For, though (after the administration was taken in effect from the ordinary, and transferred to the *Meeker*, 36 N. Y. 15; *King v. Talbot*, 40 N. Y. 76; see 79 N. Y. 136; 113 N. Y. 198; 149 Mass. 82; 45 N. J. Eq. 767.)

¹⁹ See *ante*, p. 547, note 1.

²⁰ But this rule has been changed; and it is now provided by statute, that any such undisposed of residue shall be distributed among the next of kin, in accordance with the statute of distributions. Similar statutes exist in the various American States.

relations of the deceased) the spiritual court endeavored to compel a distribution, and took bonds of the administrator for that purpose, they were prohibited by the temporal courts, and the bonds declared void at law. And the right of the husband not only to administer, but also to enjoy exclusively, the effects of his deceased wife, depends still on this doctrine of the common law: the statute of frauds declaring only, that the statute of distributions does not extend to this case. But now these controversies are quite at an end: for, by the statute 22 & 23 Car. II., ch. 10, explained by 29 Car. II., ch. 30, it is enacted, that the surplusage of intestates' estates (except of *femes-covert*, which are left as at common law),* shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner: One third shall go to the widow of the intestate, and the residue in equal proportions to his children, or, if dead, to their representatives; that is, their lineal descendants: if there are no children or legal representatives subsisting, then a moiety shall go the widow, and a moiety to the next of kindred in equal degree and their representatives: if no widow, the whole shall go to the children: if neither widow nor children, the whole shall be distributed among the next of kin in equal degree and their representatives: but no representatives are admitted, among collaterals, farther than the children of the intestate's brothers and sisters. The next of kindred, here referred to, are to be investigated by the same rules of consanguinity, as those who are entitled to letters of administration; of whom we have sufficiently spoken.²¹ *And therefore by this statute the mother, as [*516 well as the father, succeeded to all the personal effects of their children, who died intestate and without wife or issue: in exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father; but by statute 1 Jac. II., ch. 17, if the father be dead, and any of the children die intestate without wife or issue, in the lifetime of the mother, she and each of the remaining children, or their representatives, shall divide his effects in equal portions.

It is obvious to observe, how near a resemblance this statute of distributions bears to our ancient English law, *de rationabili*

²¹ Statutes of distribution of similar scope and purport, but differing somewhat in details, have been enacted in the several American States.

parte bonorum ; spoken of at the beginning of this chapter ; and which Sir Edward Coke himself, though he doubted the generality of its restraint on the power of devising by will, held to be universally binding (in point of conscience at least) upon the administrator or executor, in the case of either a total or partial intestacy. It also bears some resemblance to the Roman law of succession *ab intestato* ; which, and because the act was also penned by an eminent civilian, has occasioned a notion that the parliament of England copied it from the Roman prætor : though, indeed, it is little more than a restoration, with some refinements and regulations, of our old constitutional law ; which prevailed as an established right and custom from the time of King Canute downwards, and many centuries before Justinian's laws were known or heard of in the western parts of Europe. So, likewise, there is another part of the statute of distributions, where directions are given that no child of the intestate (except his heir-at-law) on whom he settled in his lifetime any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their *517] *brothers and sisters ; but, if the estates so given them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal. This just and equitable provision hath been also said to be derived from the *collatio bonorum* of the imperial law : which it certainly resembles in some points, though it differs widely in others. But it may not be amiss to observe, that with regard to goods and chattels, this is part of the ancient custom of London, of the Province of York, and of our sister kingdom of Scotland : and, with regard to lands descending in co-parcenary, that it hath always been, and still is, the common law of England, under the name of *hotchpot*.

Before I quit this subject, I must, however, acknowledge, that the doctrine and limits of representation laid down in the statute of distributions, seem to have been principally borrowed from the civil law : whereby it will sometimes happen, that personal estates are divided *per capita*, and sometimes *per stirpes* ; whereas the common law knows no other rule of succession but that *per stirpes* only. They are divided *per capita*, to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure repræsentationis*, in the

right of another person. As, if the next of kin be the intestate's three brothers, A., B. and C.; here his effects are divided into three equal portions, and distributed *per capita*, one to each: but, if one of these brothers, A., had been dead, leaving three children, and another, B., leaving two; then the distribution must have been *per stirpes*; viz. one third to A.'s three children, another third to B.'s two children; and the remaining third to C., the surviving brother: yet, if C. had also been dead, without issue, then A.'s and B.'s five children, being all in equal degree to the intestate, would take in their own rights *per capita*; viz., each of them one fifth part.

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BOOK THE THIRD.

OF PRIVATE WRONGS.

CHAPTER I.

[BL. COMM.—BOOK III. CH. I.]

Of the Redress of Private Wrongs by the mere act of the Parties.

AT the opening of these Commentaries municipal law was in general defined to be, “a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong.” From hence therefore it followed, that the primary objects of the law are the establishment of rights, and the prohibition of wrongs. And this occasioned the distribution of these collections into two general heads; under the former of which we have already considered the *rights* that were defined and established, and under the latter are now to consider the *wrongs* that are forbidden, and redressed by the laws of England.

In the prosecution of the first of these inquiries, we distinguished rights into two sorts: first, such as concern, or are annexed to the persons of men, and are then called *jura personarum*, or *the rights of persons*; which, together with the means of acquiring and losing them, composed the first book of these Commentaries: and secondly, such as a man may acquire over external objects, or things unconnected with his person, which are called *jura rerum*, or *the rights of things*; and these, with the means of transferring them from man to man, were the subject of the second book. I am now therefore to pro-

ceed to the consideration of *wrongs*; which for the most part convey to us an idea merely negative, as being nothing else but a privation of right. For which reason it was necessary, that before we entered at all into the discussion of wrongs, we should entertain a clear and distinct notion of rights: the contemplation of what is *jus* being necessarily prior to what may be termed *injuria*, and the definition of *fas* precedent to that of *nefas*.

Wrongs are divisible into two sorts or species: *private wrongs* and *public wrongs*. The former are an infringement, or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors*. To investigate the first of these species of wrongs, with their legal remedies, will be our employment in the present book; and the other species will be reserved till the next or concluding one.

The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited. This remedy is therefore *principally* to be sought by application to these courts of justice; that is, by civil suit or action. For which reason our chief employment in this book will be to consider the redress of private wrongs, by *suit* or *action* in courts. But as there are certain injuries of such a nature, that some of them furnish and others require a more speedy remedy than can be had in the ordinary forms of justice, there is allowed in those cases an extrajudicial or eccentric kind of remedy; of which I shall first of all treat, before I consider the several remedies by suit: and, to that end shall distribute the redress of private wrongs into two several species: first, that which is obtained by the *mere act* of the *parties* themselves; secondly, that which arises from *suit* or *action* in courts.

And, *first*, of that redress of *private* injuries, which is obtain

ed by the *mere* act of the *parties*. This is of two sorts : first, that which arises from the act of the injured party only ; and, secondly, that which arises from the joint act of all the parties together : both which I shall consider in their order.

Of the first sort, or that which arises from the sole act of the injured party, is :—

I. The *defence* of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or *any* of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force ; and the breach of the peace, which happens, is chargeable upon him only who began the affray. For the law, in this case, respects the passions of the human mind ; and (when external violence is offered to a man himself, or those to whom he bears a near connection) makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force ; since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defence, therefore, as it is justly called, the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law particularly, it is held an excuse for breaches of the peace, nay even for homicide itself : but care must be taken, that the resistance does not exceed the bounds of mere defence and prevention ; for then the defender would himself become an aggressor.

II. Recaption or *reprisal* is another species of remedy by the mere act of the party injured. This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant : in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them, wherever he happens to find them ; so it be not in a riotous manner, or attended with a breach of the peace. The reason for this is obvious ; since it may fre-

quently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed; and his wife, children, or servants, concealed or carried out of his reach; if he had no speedier remedy than the ordinary process of law. If therefore he can so contrive it as to gain possession of his property again, without force or terror, the law favors and will justify his proceeding. But, as the public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided, that this natural right of recaption shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law.†

III. As recaption is a remedy given to the party himself, for an injury to his *personal* property, so, thirdly, a remedy of the same kind for injuries to *real* property, is by *entry* on lands and tenements, when another person without any right has taken possession thereof. This depends in some measure on like reasons with the former; and like that too, must be peaceable and without force. There is some nicety required to define and distinguish the cases, in which such entry is lawful or otherwise; it will therefore be more fully considered, in a subsequent chapter; being only mentioned in this place for the sake of regularity and order.

IV. A fourth species of remedy by the mere act of the party injured, is the *abatement*, or removal of *nuisances*. What nuisances are, and their several species, we shall find a more proper place to inquire under some of the subsequent divisions. At present I shall only observe, that whatsoever unlawfully annoys or doth damage to another is a nuisance; and such nuisance may be abated, that is, taken away or re-

† In some American States, an owner of goods which have been wrongfully taken from him, may retake them, using no more force than is necessary. (59 N. H. 235; 56 Vt. 703; 148 Mass. 529; see 47 Barb. 592; 11 H. L. C. 621.)

moved, by the party aggrieved thereby, so as he commits no riot in the doing of it. If a house or wall is erected so near to mine that it stops my ancient lights, which is a *private* nuisance, I may enter my neighbor's land, and peaceably pull it down.† Or if a new gate be erected across the public highway, which is a *common* nuisance, any of the king's subjects passing that way, may cut it down and destroy it. And the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice.¹

V. A fifth case, in which the law allows a man to be his own avenger, or to minister redress to himself, is that of *distraining* cattle or goods for non-payment of rent, or other duties; or, distraining another's cattle *damage-feasant*, that is, doing damage, or trespassing upon his land. The former intended for the benefit of landlords, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter arising from the necessity of the thing itself, as it might otherwise be impossible at a future time to ascertain, whose cattle they were that committed the trespass or damage.²

These are the several species of remedies which may be had by the *mere act* of the *party injured*. I shall next briefly mention such as arise from the *joint act of all the parties* together. And these are only two, *accord* and *arbitration*.

I. Accord is a satisfaction agreed upon between the party injuring, and the party injured; which, when performed, is a bar

¹ But a private individual has no right to abate a public nuisance of his own authority, unless it do him a special injury, and then only to the extent that it interferes with his rights. He would not, for example, have a right to remove every obstruction in a public thoroughfare, but only any particular one by which his right of passage was impeded. The right of abatement can be exercised by a private person only for a private wrong. (*Harrower v. Ritson*, 37 Barb. 301; see 119 N. Y. 226; 59 Wis. 52; 67 Cal. 130.)

² The remedy of distress for non-payment of rent has been abolished in many of the American States by statute. But the right of distress of cattle *damage-feasant* is still generally recognized. In some States it is governed by special statutory provisions. (See 131 Mass. 426; 46 Mich. 460; 74 Ind. 449.)

† See *ante*, p. 516, note 4.

of all actions upon this account. As if a man contract to build a house or deliver a horse, and fail in it; this is an injury, for which the sufferer may have his remedy by action; but if the party injured accepts a sum of money, or other thing, as a satisfaction, this is a redress of that injury, and entirely takes away the action. By several late statutes (particularly 11 Geo. II., ch. 19, in case of irregularity in the method of distraining, and 24 Geo. II., ch. 24, in case of mistakes committed by justices of the peace), even *tender* of sufficient amends to the party injured is a bar of all actions, whether he thinks proper to accept such amends or no.⁸

II. Arbitration is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of two or more *arbitrators*; who are to decide the controversy: and if they do not agree, it is usual to add, that another person be called in as *umpire* (*imperator* or *impar*) to whose sole judgment it is then referred: or frequently there is only one arbitrator originally appointed. This decision, in any of these cases, is called an *award*. And thereby the question is as fully determined,

⁸ An accord must be fully carried out according to its terms, in order to amount to a satisfaction. If not executed, it is not a bar to an action on the claim which it is intended to discharge. (75 N. Y. 574; 20 Wall. 289; 120 U. S. 198.) The accord and satisfaction must, moreover, be advantageous to the creditor. On this ground it is held that if a debt be liquidated or of a fixed and certain amount, the payment and acceptance of a less sum in discharge thereof will not amount to a satisfaction. (*Bunge v. Koop*, 48 N. Y. 225; *Foakes v. Beer*, 9 App. Cas. 605.) But the rule is otherwise, if any specific article of property is rendered and received in discharge of a debt, though its value is less than the debt; or the note of a third person in full payment of the claim; or additional security as a satisfaction;—in these and like cases the pre-existing debt is discharged. (*Ludington v. Bell*, 77 N. Y. 138; *Kellogg v. Richards*, 14 Wend. 116; *Conkling v. King*, 10 N. Y. 440; *Bull v. Bull*, 43 Conn. 455.) So part payment of a liquidated demand before it became due, or at some other place than that agreed upon, would be a complete satisfaction, if received as such; and the same would be true, in other analogous cases, where the accord was founded upon some particular benefit to the creditor, which might serve as an independent consideration. (*Goodnow v. Smith*, 18 Pick. 414; *Rose v. Hall*, 26 Ct. 392.) So when there is a *bona fide* dispute as to the amount due, any sum received in discharge will amount to a satisfaction. (*Pierce v. Pierce*, 25 Barb. 243.) There may be an accord and satisfaction of claims for tort as well as for those in contract. (136 Mass. 503; 31 Minn. 404.)

and the right transferred or settled, as it could have been by the agreement of the parties, or the judgment of a court of justice. But the right of real property cannot thus pass by a mere award : which subtilty in point of form (for it is now reduced to nothing else) had its rise from feudal principles ; for, if this had been permitted, the land might have been aliened collusively without the consent of the superior. Yet doubtless an arbitrator may now award a conveyance or a release of land ; and it will be a breach of the arbitration bond to refuse compliance. For, though originally the submission to arbitration used to be by word, or by deed, yet both of these being revocable in their nature, it is now become the practice to enter into mutual bonds, with condition to stand to the award or arbitration of the arbitrators or umpire therein named. And experience having shown the great use of these peaceable and domestic tribunals, especially in settling matters of account, and other mercantile transactions, which are difficult and almost impossible to be adjusted on a trial at law ; the legislature has now established the use of them, as well in controversies where causes are depending, as in those where no action is brought ; enacting by statute 9 & 10 Wm. III., ch. 15, that all merchants and others, who desire to end any controversy, suit, or quarrel (for which there is no other remedy but by personal action or suit in equity), may agree, that their submission of the suit to arbitration or umpirage shall be made a rule of any of the king's courts of record, and may insert such agreement in their submission, or promise, or condition of the arbitration bond : which agreement being proved upon oath by one of the witnesses thereto, the court shall make a rule that such submission and award shall be conclusive : and, after such rule made, the parties disobeying the award shall be liable to be punished, as for a contempt of the court ; unless such award shall be set aside, for corruption or other misbehavior in the arbitrators or umpire, proved on oath to the court, within one term after the award is made. And, in consequence of this statute, it is now become a considerable part of the business of the superior courts, to set aside such awards when partially or illegally made ; or to enforce their execution, when

legal, by the same process of contempt, as is awarded for disobedience to those rules and orders, which are issued by the courts themselves.⁴

⁴ This statute has been amended by later enactments, but its general scope and purport have not been materially altered. It is frequently provided by statute in this country, that the persons agreeing upon an arbitration may stipulate in the written submission, by which the controversy is presented to the arbitrators selected, that a judgment of a designated court shall be rendered upon the award. The award then becomes enforceable as a regular judgment. Methods are also usually prescribed by statute for the rectification of errors in the rendering of the award, or for vacating it on the ground that it was procured by fraud or corruption, or that the arbitrators were guilty of evident partiality, or of misconduct, etc. (*Carter v. Carter*, 109 Mass. 306; *Hall v. Norwalk Ins. Co.*, 57 Conn. 105; *N. Y. Lumber Co. v. Schnieder*, 119 N. Y. 475.)

It is the general rule in this country that a controversy relating to real estate may be submitted to arbitration, as well as disputes of other kinds. But in some States this is prohibited. Thus in New York it is provided, that no such submission can be made respecting the claim of any person to a freehold estate in lands. (Code Civ. Pro. §§ 2365-2386. Consult, generally, Morse on Arbitration and Award.)

CHAPTER II.

[BL. COMM.—BOOK III. CH. III.]

Of Courts in General.

THE next and principal object of our inquiries is the redress of injuries by *suit in courts*: wherein the act of the parties and the act of law co-operate; the act of the parties being necessary to set the law in motion, and the process of the law being in general the only instrument by which the parties are enabled to procure a certain and adequate redress.

And here it will not be improper to observe, that although in the several cases of redress by the act of the parties mentioned in a former chapter, the law allows an extra-judicial remedy, yet that does not exclude the ordinary course of justice: but it is only an additional weapon put into the hands of certain persons in particular instances, where natural equity or the peculiar circumstances of their situation require a more expeditious remedy, than the formal process of any court of judicature can furnish. Therefore, though I may defend myself, or relations, from external violence, I yet am afterwards entitled to an action of assault and battery; though I may retake my goods, if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action of trover or detinue: I may either enter on the lands, on which I have a right of entry, or may demand possession by a real action: I may either abate a nuisance by my own authority, or call upon the law to do it for me; I may distrain for rent, or have an action of debt, at my own option; if I do not distrain my neighbor's cattle *damage-feasant*, I may compel him by action of trespass to make me a fair satisfaction. And with regard to accords and arbitrations, these, in their nature being merely an agreement or compromise, most indisputably suppose a previous right of obtaining redress some other way; which is given up by such agreement.

In all other cases it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded. And in treating of these remedies by suit in courts, I shall pursue the following method: *first*, I shall consider the nature and several species of courts of justice; and, *secondly*, I shall point out in which of these courts, and in what manner, the proper remedy may be had for any private injury; or, in other words, what injuries are cognizable, and how redressed, in each respective species of courts.

First then, of courts of justice. And herein we will consider, *first*, their nature and incidents in general; and then, the several species of them, erected and acknowledged by the laws of England.

A court is defined to be a place wherein justice is judicially administered. And, as by our excellent constitution the sole executive power of the laws is vested in the person of the king, it will follow that all courts of justice, which are the medium by which he administers the laws, are derived from the power of the crown. For, whether created by act of parliament, or letters-patent, or subsisting by prescription (the only methods by which any court of judicature can exist), the king's consent in the two former is expressly, and in the latter impliedly, given. In all these courts the king is supposed in contemplation of law to be always present; but as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative.

For the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a prodigious variety of courts, some with a more limited, others with a more extensive jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal and by way of review. All these in their turn will be taken notice of in their respective places: and I shall therefore here only mention one distinction, that runs throughout them all; *viz.*, that some of them are courts *of record*, others *not of record*. A court of record is that, where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and super-eminent authority, that their truth is not to be called in question

For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary, and if the existence of a record be denied, it shall be tried by nothing but itself ; that is, upon bare inspection whether there be any such record or no ; else there would be no end of disputes. But, if there appear any mistake of the clerk in making up such record, the court will direct him to amend it. All courts of record are the king's courts, in right of his crown and royal dignity, and therefore no other court hath authority to fine or imprison ; so that the very erection of a new jurisdiction with the power of fine or imprisonment makes it instantly a court of record. A court not of record is the court of a private man ; whom the law will not intrust with any discretionary power over the fortune or liberty of his fellow-subjects.¹ Such are the courts-baron incident to every manor, and other inferior jurisdictions : where the proceedings are not enrolled or recorded ; but as well their existence as the truth of the matters therein contained shall, if disputed, be tried and determined by a jury. These can hold no plea of matters cognizable by the common law, unless under the value of 40s. nor of any forcible injury whatsoever, not having any process to arrest the person of the defendant.

In every court there must be at least three constituent parts, the *actor*, *reus* and *judex* : the *actor*, or plaintiff, who complains of an injury done ; the *reus*, or defendant, who is called upon to make satisfaction for it ; and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply the remedy. It is also usual in the superior courts to have attorneys, and advocates or counsel, as assistants.

An attorney-at-law answers to the *procurator*, or proctor, of the civilians and canonists. And he is one who is put in the place, stead, or *turn* of another, to manage his matters of law. Formerly every suitor was obliged to appear in person, to prosecute or defend his suit (according to the old Gothic constitution), unless by special license under the king's letters patent. This

¹ Courts not of record in the United States cannot be defined as "the courts of private men." It is sufficient to describe them as inferior tribunals, without clerk or seal, whose proceedings are informally recorded. Courts of justices of the peace generally come within this category.

is still the law in criminal cases.² And an idiot cannot to this day appear by attorney, but in person, for he hath not discretion to enable him to appoint a proper substitute: and upon his being brought before the court in so defenceless a condition, the judges are bound to take care of his interest, and they shall admit the best plea in his behalf that any one present can suggest.³ But, as in the Roman law, "*cum olim in usu fuisset, alterius nomine agi non posse, sed, quia hoc non minimam incommoditatem habebat cœperunt homines per procuratores litigare,*" so with us, upon the same principle of convenience, it is now permitted in general, by divers ancient statutes, whereof the first is statute Westm. 2, ch. 10, that attorneys may be made to prosecute or defend any action in the absence of the parties to the suit. These attorneys are now formed into a regular corps; they are admitted to the execution of their office by the superior courts of Westminster-hall; and are in all points officers of the respective courts of which they are admitted; and, as they have had many privileges on account of their attendance there, so they are peculiarly subject to the censure and animadversion of the judges. No man can practice as an attorney in any of those courts, but such as is admitted and sworn an attorney of that particular court: an attorney of the court of king's bench cannot practice in the court of common pleas; nor *vice versa*.⁴ To practice in the court of chancery, it is also necessary to be admitted a solicitor therein: and by the statute 22 Geo. II., ch. 46, no person shall act as an attorney at the court of quarter sessions, but such as has been regularly admitted in some superior court of record. So early as the statute 4 Henry IV., ch. 18, it was enacted that attorneys should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty. And many subsequent statutes have laid them under farther regulations.

² But now in England, counsel is allowed, in criminal cases, as in the United States.

³ But if a person has been judicially declared to be of unsound mind, and has been placed under the guardianship of a committee, he will be represented in suits at law by such committee, who may employ counsel; and probably an idiot would be allowed, at the present day, to appear by attorney, though no committee were appointed. (See *Lang v. Whidden*, 2 N. H. 435.)

⁴ But now that the Supreme Court of Judicature has been established (see note 9, *post*), solicitors are admitted after due examination as officers of this court, and may practice in any of its divisions and also in the ecclesiastical courts. (40 & 41 Vict. c. 25; 44 & 45 id. c. 68, s. 24.) The single name solicitor has superseded the different names, attorney, solicitor, and proctor.

Of advocates, or (as we generally call them) counsel, there are two species or degrees ; barristers, and serjeants. The former are admitted after a considerable period of study, or at least standing, in the inns of court ; and are in our old books styled apprentices, *apprenticii ad legem*, being looked upon as merely learners, and not qualified to execute the full office of an advocate till they were sixteen years' standing ; at which time, according to Fortescue, they might be called to the state and degree of serjeants, or *servientes ad legem*. How ancient and honorable this state and degree is, with the form, splendor, and profits attending it, hath been so fully displayed by many learned writers, that it need not be here enlarged on. I shall only observe, that serjeants at law are bound by a solemn oath to do their duty to their clients : and that by custom the judges of the courts of Westminster are always admitted into this venerable order, before they are advanced to the bench ; the original of which was probably to qualify the *puisne* barons of the exchequer to become justices of assize, according to the exigence of the statute of 14 Edw. III., ch. 16. From both these degrees some are usually selected to be his majesty's counsel learned in the law, the two principal of whom are called his attorney, and solicitor general. The first king's counsel, under the degree of serjeant, was Sir Francis Bacon, who was made so *honoris causa*, without either patent or fee ; so that the first of the modern order (who are now the sworn servants of the crown, with a standing salary) seems to have been Sir Francis North, afterwards lord keeper of the great seal to King Charles II. These king's counsel answer, in some measure, to the advocates of the revenue, *advocati fisci*, among the Romans. For they must not be employed in any cause against the crown without special license ;⁶ in which restriction they agree with the advocates of the fisc : but in the imperial law the prohibition was carried still further, and perhaps was more for the dignity of the sovereign : for, excepting some peculiar causes, the fiscal advocates were not permitted to be at all concerned in private suits between subject and subject. A

⁶ But license to appear for a plaintiff, in a suit against the crown, or to defend a prisoner accused of crime, is never refused, and may be obtained by the payment of a small fee. King's counsel do not act wholly in behalf of the crown, but may be retained in private causes, in the same way as other barristers.

custom has of late years prevailed of granting letters patent of precedence to such barristers as the crown thinks proper to honor with that mark of distinction: whereby they are entitled to such rank and pre-audience as are assigned in their respective patents; sometimes next after the king's attorney-general, but usually next after his majesty's counsel then being. These (as well as the queen's attorney and solicitor-general) rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts; but receive no salaries, and are not sworn; and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately may take upon them the protection and defence of any suitors, whether plaintiff or defendant; who are therefore called their *clients*, like the dependents upon the ancient Roman orators. Those indeed practised *gratis*, for honor merely, or at most for the sake of gaining influence: and so likewise it is established with us, that a counsel can maintain no action for his fees; which are given, not as *locatio vel conductio*, but as *quiddam honorarium*; not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation:⁶ as is also laid down with regard to advocates in the civil law, whose *honorarium* was directed by a decree of the senate not to exceed in any case ten thousand sesterces, or about 80*l.* of English money. And, in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give check to the unseemly licentiousness of prostitute and illiberal men (a few of whom may sometimes insinuate themselves even into the most honorable professions), it hath been holden that a counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless: but if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the

⁶ In the United States, the English distinction between attorneys and barristers has not been retained, except in the State of New Jersey, and members of the legal profession act both as attorneys and counsellors. For services rendered in either capacity they may enter into valid agreements with their clients as to the amount of fees to be paid; or, if there be no express agreement, they will be entitled to receive the reasonable value of their services upon an implied contract. (See *Queen v. Doutré*, 9 App. Cas. 745; 40 N. J. L. 195; 48 id. 610; 26 Wend. 451; and *post*, p. 905, note 8.)

cause in hand he is then liable to an action from the party injured.⁷ And counsel guilty of deceit or collusion are punishable by the statute Westm. 1. 3 Edw. I., ch. 28, with imprisonment for a year and a day, and perpetual silence in the courts ; a punishment still sometimes inflicted for gross misdemeanors in practice.

CHAPTER III.

[BL. COMM.—BOOK III. CH. IV.]

Of the Public Courts of Common Law and Equity.

WE are next to consider the several species and distinctions of courts of justice, which are acknowledged and used in this kingdom. And these are, either such as are of public and general jurisdiction throughout the whole realm ; or such as are only of a private and special jurisdiction in some particular parts of it. Of the former there are three sorts; the universally estab-

⁷ (See *Garr v. Selden*, 4 N. Y. 91 ; *Gilbert v. People*, 1 Den. 41 ; *Marsh v. Ellsworth*, 50 N. Y. 309 ; *Munster v. Lamb*, 11 Q. B. D. 588.)

"Every client has a right to the exercise, on the part of his attorney" (in the United States, this would apply to all lawyers), "of care and diligence in the execution of the business entrusted to him, and to a fair average amount of professional skill and knowledge ; and if attorneys have not as much of these qualities as they ought to possess, or if, having them, they have neglected to employ them, the law makes them responsible for the loss which has accrued to their clients from their deficiencies. It is the duty of every attorney and solicitor to act with fidelity to his client, and to keep the secrets of the latter. 'It would be extremely difficult,' observes Tindal, C. J. (*Godefroy v. Dalton*, 6 Bingham, 468), 'to define the exact amount of skill and diligence which an attorney undertakes to furnish in the conduct of a cause. The cases, however, appear to establish in general, that he is liable for the consequence of ignorance or non-observance of the rules of practice of his court, for the want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses, etc. ; but he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction.'" (Addison on Torts, § 570 [Amer. ed.] ; see 44 Cal. 542 ; 55 Ill. 151 ; 57 Pa. St. 161 ; 4 Peters, 172.)

lished courts of common law and equity ; the ecclesiastical courts ; and courts maritime. And, first, of such public courts as are courts of common law and equity.

The policy of our ancient constitution, as regulated and established by the great Alfred, was to bring justice home to every man's door, by constituting as many courts of judicature as there are manors and townships in the kingdom ; wherein injuries were redressed in an easy and expeditious manner, by the suffrage of neighbors and friends. These little courts, however, communicated with others of a larger jurisdiction, and those with others of a still greater power ; ascending gradually from the lowest to the supreme courts, which were respectively constituted to correct the errors of the inferior ones, and to determine such causes as by reason of their weight and difficulty demanded a more solemn discussion. The course of justice flowing in large streams from the king, as the fountain, to his superior courts of record ; and being then subdivided into smaller channels, till the whole and every part of the kingdom were plentifully watered and refreshed. An institution that seems highly agreeable to the dictates of natural reason, as well as of more enlightened policy. These inferior courts, at least the name and form of them, still continue in our legal constitution ; but as the superior courts of record have in practice obtained a concurrent original jurisdiction with these ; and as there is, besides, a power of removing plaints or actions thither from all the inferior jurisdictions ; upon these accounts (amongst others) it has happened that these petty tribunals have fallen into decay, and almost into oblivion ; whether for the better or the worse, may be matter of some speculation, when we consider on the one hand the increase of expense and delay, and on the other the more able and impartial decision, that follow from this change of jurisdiction.¹

These several species of common law courts, which, though dispersed universally throughout the realm, are nevertheless of a partial jurisdiction, and confined to particular districts, yet communicate with, and, as it were, are members of, the superior

¹ There is here omitted from the text that portion of this chapter which relates to various courts of inferior jurisdiction, which have now become obsolete. The chief courts of inferior jurisdiction in civil cases, now existing, are the county courts ; but the nature and extent of their jurisdiction has been much changed since the time of Blackstone. (See 51 & 52 Vict. c. 43.)

courts of a more extended and general nature ; which are calculated for the administration of redress, not in any one lordship, hundred, or county only, but throughout the whole kingdom at large. Of which sort is—

I. The court of *common pleas*, or, as it is frequently termed in law, the court of *common bench*.

By the ancient Saxon constitution, there was only one superior court of justice in the kingdom ; and that court had cognizance both of civil and spiritual causes : *viz.*, the *wittena-gemote*, or general council, which assembled annually or oftener, wherever the king kept his Christmas, Easter or Whitsuntide, as well to do private justice as to consult upon public business. At the Conquest the ecclesiastical jurisdiction was diverted into another channel ; and the Conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as counsellors to the crown. He therefore established a constant court in his own hall, thence called by Bracton and other ancient authors, *aula regia*, or *aula regis*. This court was composed of the king's great officers of state resident in his palace, and usually attendant on his person : such as the lord high constable and lord mareschal, who chiefly presided in matters of honor and of arms ; determining according to the law military and the law of nations. Besides these, there were the lord high steward, and lord great chamberlain ; the steward of the household ; the lord chancellor, whose peculiar business it was to keep the king's seal, and examine all such writs, grants and letters, as were to pass under that authority ; and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars, or justices ; and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these in their several departments transacted all secular business, both criminal and civil, and likewise the matters of the revenue ; and over all presided one special magistrate, called the chief justiciar, or *capitalis justiciarius totius Angliæ* ; who was also the principal minister of state, the second man in the kingdom, and by virtue of his office guardian of the realm in the king's absence. And this officer it was who

principally determined all the vast variety of causes that arose in this extensive jurisdiction ; and from the plenitude of his power grew at length both obnoxious to the people, and dangerous to the government which employed him.

This great universal court being bound to follow the king's household in all his progresses and expeditions, the trial of common causes therein was found very burthensome to the subject. Wherefore King John, who dreaded also the power of the justiciar, very readily consented to that article which now forms the eleventh chapter of *magna charta*, and enacts, "that *communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo*." This certain place was established in Westminster-hall, the place where the *aula regis* originally sat, when the king resided in that city ; and there it hath ever since continued. And the court being thus rendered fixed and stationary, the judge became so too, and a chief, with other justices of the common pleas, was thereupon appointed ; with jurisdiction to hear and determine all pleas of land, and injuries, merely civil, between subject and subject. Which critical establishment of this principal court of common law, at that particular juncture and that particular place, gave rise to the inns of court in its neighborhood ; and thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who labored to extirpate and destroy it.

The *aula regia* being thus stripped of so considerable a branch of its jurisdiction, and the power of the chief justiciar being also considerably curbed by many articles in the great charter, the authority of both began to decline apace under the long and troublesome reign of King Henry III. And, in further pursuance of this example, the other several offices of the chief justiciar were under Edward the First (who new-modelled the whole frame of our judicial polity) subdivided and broken into distinct courts of judicature. A court of chivalry was erected, over which the constable and mareschal presided : as did the steward of the household over another, constituted to regulate the king's domestic servants. The high steward, with the barons of parliament, formed an august tribunal for the trial of delinquent peers ; and the barons reserved to themselves in Parliament the right of reviewing the sentences of other courts in the last re

sort. The distribution of common justice between man and man was thrown into so provident an order, that the great judicial officers were made to form a check upon each other: the court of chancery issuing all original writs under the great seal to the other courts; the common pleas being allowed to determine all causes between private subjects; the exchequer managing the king's revenue; and the court of king's bench retaining all the jurisdiction which was not cantoned out to other courts, and particularly the superintendence of all the rest by way of appeal: and the sole cognizance of pleas of the crown or criminal causes. For pleas or suits are regularly divided into two sorts: *pleas of the crown*, which comprehend all crimes and misdemeanors, wherein the king (on behalf of the public) is the plaintiff; and *common pleas*, which include all civil actions, depending between subject and subject. The former of these were the proper object of the jurisdiction of the court of king's bench: the latter of the court of common pleas: which is a court of record, and is styled by Sir Edward Coke the lock and key of the common law; for herein only can real actions, that is, actions which concern the right of freehold or the realty, be originally brought: and all other, or personal, pleas between man and man, are likewise here determined; though in most of *them* the king's bench has also a concurrent authority.

The judges of this court are at present four in number, one chief and three *puisnè* justices, created by the king's letters-patent, who sit every day in the four terms to hear and determine all matters of law arising in civil causes, whether real, personal, or mixed and compounded of both.² These it takes cognizance of, as well originally, as upon removal from the inferior courts before-mentioned. But a writ of error, in the nature of an appeal, lies from this court into the court of king's bench.

² The number of judges in the superior courts of common-law, the King's Bench, the Common Pleas, and the Exchequer, was subsequently increased to six. In the two former courts, there was a chief-justice and five *puisnè* justices; in the latter, a chief-baron and five *puisnè* barons, a different designation being adopted in this court. The King's Bench is still virtually in existence, though, as explained hereafter in note (9), there has been a complete reorganization in the judicial system of England.

It became also the practice to take writs of error to the Exchequer Chamber, instead of the King's Bench; the Exchequer Chamber consisting of the judges of the two courts in which the case was not first tried.

II. The court of king's bench (so called because the king used formerly to sit there in person, the style of the court still being *coram ipso rege*) is the supreme court of common law in the kingdom; consisting of a chief justice and three *puisnè* justices, who are by their office the sovereign conservators of the peace, and supreme coroners of the land. Yet, though the king himself used to sit in this court, and still is supposed so to do; he did not, neither by law is he empowered to determine any cause or motion, but by the mouth of his judges, to whom he hath committed his whole judicial authority.

This court, which (as we have said) is the remnant of the *aula regia*, is not, nor can be, from the very nature and constitution of it, fixed to any certain place, but may follow the king's person wherever he goes: for which reason all process issuing out of this court in the king's name is returnable "*ubicunque fuerimus in Anglia*." It hath indeed, for some centuries past, usually sat at Westminster, being an ancient palace of the crown; but might remove with the king to York or Exeter, if he thought proper to command it. And we find that, after Edward I. had conquered Scotland, it actually sat at Roxburgh. And this movable quality, as well as its dignity and power, are fully expressed by Bracton, when he says that the justices of this court are "*capitales, generales, perpetui, et majores; a latere regis residentes, qui omnium aliorum corrigere tenentur injurias, et errores*." And it is moreover especially provided in the *articuli super cartas*, that the king's chancellor, and the justices of his bench, shall follow him, so that he may have at all times near unto him some that be learned in the laws.

The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject, by speedy and summary interposition. It takes cognizance both of criminal and civil causes; the former in what is called the crown-side or crown-office; the latter in the plea-side of the court. The jurisdiction of the crown-side it is not our present business to consider: that will be more properly dis-

cussed in the ensuing book. But on the plea-side, or civil branch, it hath an original jurisdiction and cognizance of all actions of trespass, or other injury alleged to be committed *vi et armis*; of actions for forgery of deeds, maintenance, conspiracy, deceit, and actions on the case which allege any falsity or fraud: all of which savor of a criminal nature, although the action is brought for a civil remedy; and make the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party. The same doctrine is also now extended to all actions on the case whatsoever: but no action of debt or detinue, or other mere civil action, can by the *common law* be prosecuted by any subject in this court, by *original* writ out of chancery; though an action of debt, given by *statute*, may be brought in the king's bench as well as in the common pleas. And yet this court might always have held plea of any civil action (other than actions real) provided the defendant was an officer of the court; or in the custody of the marshal, or prison-keeper, of this court; for a breach of the peace or any other offence. And, in process of time, it began by a fiction to hold plea of all personal actions whatsoever, and has continued to do so for ages: it being surmised that the defendant is arrested for a supposed trespass, which he never has in reality committed; and, being thus in the custody of the marshal of the court, the plaintiff is at liberty to proceed against him for any other personal injury: which surmise, of being in the marshal's custody, the defendant is not at liberty to dispute. And these fictions of law, though at first they may startle the student, he will find upon further consideration to be highly beneficial and useful; especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law. So true it is, that *in fictione juris semper subsistit æquitas*. In the present case, it gives the suitor his choice of more than one tribunal, before which he may institute his action; and prevents the circuitry and delay of justice, by allowing that suit to be originally, and in the first instance, commenced in this court, which, after a determination in another, might ultimately be brought before it on a writ of error.

For this court is likewise a court of appeal, into which may be removed by a writ of error all determinations of the court of

common pleas, and of all inferior courts of record in England. Yet even this so high and honorable court is not the *dernier resort* of the subject ; for, if he be not satisfied with any determination here, he may remove it by writ of error into the house of lords, or the court of exchequer chamber, as the case may happen, according to the nature of the suit, and the manner in which it has been prosecuted.

III. The court of exchequer is inferior in rank not only to the court of king's bench, but to the common pleas also : but I have choser. to consider it in this order, on account of its double capacity, as a court of law and a court of equity also.⁴ It is a very ancient court of record, set up by William the Conqueror, as a part of the *aula regia*, though regulated and reduced to its present order by King Edward I.; and intended principally to order the revenues of the crown, and to recover the King's debts and duties. It is called the exchequer, *scaccharium*, from the checked cloth, resembling a chess-board, which covers the table there : and on which, when certain of the king's accounts are made up, the sums are marked and scored with counters. It consists of two divisions : the receipt of the exchequer, which manages the royal revenue, and with which these commentaries have no concern : and the court or judicial part of it, which is again subdivided into a court of equity, and a court of common law.

The court of equity is held in the exchequer chamber before the lord treasurer, the chancellor of the exchequer, the chief baron, and three *puisnè* ones. These Mr. Selden conjectures to have been anciently made out of such as were barons of the kingdom, or parliamentary barons ; and thence to have derived their name ; which conjecture receives great strength from Bracton's explanation of *magna charta*, ch. 14, which directs that the earls

⁸ But the practice was subsequently changed, so that appeals from either of the three superior courts of common-law were taken, in the first instance, to the court of Exchequer Chamber, which, for the hearing of an appeal from one of these courts, consisted of the judges of the other two courts. Thus, if an appeal were taken from the Queen's Bench, the Exchequer Chamber would be composed of the judges of the Common Pleas and the Exchequer. From the Exchequer Chamber, an appeal might be taken to the House of Lords. But the recent reorganization of the system of courts, has effected a change in this long established practice. (See *post*, note 9.

⁴ But the equitable jurisdiction of the court of exchequer was, by statute 3 Vict., ch. 5, transferred to the court of Chancery.

and barons be amerced by their peers ; that is, says he, by the barons of the exchequer. The primary and original business of this court is to call the king's debtors to account, by bill filed by the attorney-general ; and to recover any lands, tenements, or hereditaments, any goods, chattels, or other profits or benefits, belonging to the crown. So that by their original constitution the jurisdiction of the court of common pleas, king's bench, and exchequer, was entirely separate and distinct : the common pleas being intended to decide all controversies between subject and subject ; the king's bench to correct all crimes and misdemeanors that amount to a breach of the peace, the king being then plaintiff, as such offences are in open derogation of the *jura regalia* of his crown ; and the exchequer to adjust and recover his revenue, wherein the king also is plaintiff, as the withholding and non-payment thereof is an injury to his *jura fiscalia*. But, as by a fiction almost all sorts of civil actions are now allowed to be brought in the king's bench, in like manner by another fiction all kinds of personal suits may be prosecuted in the court of exchequer. For as all the officers and ministers of this court have, like those of other superior courts, the privilege of suing and being sued only in their own court ; so also the king's debtors and farmers, and all accomptants of the exchequer, are privileged to sue and implead all manner of persons in the same court of equity that they themselves are called into. They have likewise privilege to sue and implead one another, or any stranger, in the same kind of common law actions (where the personalty only is concerned) as are prosecuted in the court of common pleas.

This gives original to the common law part of their jurisdiction, which was established merely for the benefit of the king's accomptants, and is exercised by the barons only of the exchequer, and not the treasurer or chancellor. The writ upon which all proceedings here are grounded is called a *quo minus* : in which the plaintiff suggests that he is the king's farmer or debtor, and that the defendant hath done him the injury or damage complained of ; *quo minus sufficiens existit*, by which he is less able to pay the king his debt or rent. And these suits are expressly directed, by what is called the statute of Rutland, to be confined to such matters only, as specially concern the king or his ministers of the exchequer. And by the *articuli super cartas*, it is

enacted, that no common pleas be thenceforth holden in the exchequer contrary to the form of the great charter. But now, by the suggestion of privilege, any person may be admitted to sue in the exchequer as well as the king's accomptant. The surmise, of being debtor to the king, is therefore become matter of form and mere words of course, and the court is open to all the nation equally. The same holds with regard to the equity side of the court : for there any person may file a bill against another upon a bare suggestion that he is the king's accomptant ; but whether he is so, or not, is never controverted. In this court on the equity side, the clergy have long used to exhibit their bills for the non-payment of tithes ; in which case the surmise of being the king's debtor is no fiction, they being bound to pay him their first fruits, and annual tenths. But the chancery has of late years obtained a large share in this business.

An appeal from the equity side of this court lies immediately to the house of peers ; but from the common law side, in pursuance of the statute 31 Edw. III., ch. 12, a writ of error must be first brought into the court of exchequer chamber. And from the determination there had, there lies, in the *dernier resort*, a writ of error to the house of lords.

IV. The high court of chancery is the only remaining, and in matters of civil property by much the most important of any, of the king's superior and original courts of justice. It has its name of chancery, *cancellaria*, from the judge who presides here, the lord chancellor or *cancellarius* ; who, Sir Edward Coke tells us, is so termed *a cancellando*, from cancelling the king's letters patent when granted contrary to law, which is the highest point of his jurisdiction. But the office and name of chancellor (however derived) was certainly known to the courts of the Roman emperors : where it originally seems to have signified a chief scribe or secretary, who was afterwards invested with several judicial powers, and a general superintendency over the rest of the officers of the prince. From the Roman empire it passed to the Roman church, ever emulous of imperial state ; and hence every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. But in all of them he

seems to have had the supervision of all charters, letters, and such other public instruments of the crown, as were authenticated in the most solemn manner; and therefore when seals came in use, he had always the custody of the king's great seal. So that the office of chancellor, or lord keeper (whose authority by statute 5 Eliz., ch. 18, is declared to be exactly the same), is with us at this day created by the mere delivery of the king's great seal into his custody: whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom; and superior in point of precedency to every temporal lord. He is a privy counsellor by his office, and, according to lord chancellor Ellesmere, prolocutor of the house of lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom. Being formerly usually an ecclesiastic (for none else were then capable of an office so conversant in writings), and presiding over the royal chapel, he became keeper of the king's conscience; visitor in right of the king, of all hospitals and colleges of the king's foundation; and patron of all the king's livings under the value of twenty marks *per annum* in the king's books. He is the general guardian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom. And all this, over and above the vast and extensive jurisdiction which he exercises in his *judicial* capacity in the court of chancery; wherein, as in the exchequer, there are two distinct tribunals: the one ordinary, being a court of common law; the other extraordinary, being a court of equity.

The ordinary legal court is much more ancient than the court of equity. Its jurisdiction is to hold plea upon a *scire facias* to repeal and cancel the king's letters patent, when made against law, or upon untrue suggestions, and to hold plea of petitions, *monstrans de droit*, traverses of offices, and the like; when the king hath been advised to do any act, or is put in possession of any lands or goods, in prejudice of a subject's right. On proof of which, as the king can never be supposed intentionally to do any wrong, the law questions not, but he will immediately redress the injury; and refers that conscientious task to the chancellor, the keeper of his conscience. It also appertains to this court to hold plea of all personal actions, where any officer or minister of the court is a party. It might likewise hold plea (by *scire facias*)

of partitions of land in coparcenary, and of dower, where any ward of the crown was concerned in interest, so long as the military tenures subsisted : as it now may also do of the tithes of forest land, where granted by the king, and claimed by a stranger against the grantee of the crown ; and of executions on statutes, or recognizances in nature thereof, by the statute 23 Hen. VIII., ch. 6. But if any cause comes to issue in this court, that is, if any fact be disputed between the parties, the chancellor cannot try it, having no power to summon a jury : but must deliver the record *propria manu* into the court of king's bench, where it shall be tried by the country, and judgment shall be there given thereon. And when judgment is given in chancery upon demurrer or the like, a writ of error in nature of an appeal lies out of this ordinary court into the court of king's bench : though so little is usually done on the common law side of the court, that I have met with no traces of any writ of error being actually brought, since the fourteenth year of Queen Elizabeth, A. D. 1572.

In this ordinary, or legal, court is also kept the *officina justitiæ* : out of which all original writs that pass under the great seal, all commissions of charitable uses, sewers, bankruptcy, idiocy, lunacy, and the like, do issue ; and for which it is always open to the subject, who may there at any time demand and have. *ex debito justitiæ*, any writ that his occasions may call for. These writs (relating to the business of the subject) and the returns to them were, according to the simplicity of ancient times, originally kept in a hamper, *in hanaperio* ; and the others (relating to such matters wherein the crown is immediately or mediately concerned) were preserved in a little sack or bag, in *parva bagâ* : and thence hath arisen the distinction of the *hanaper* office, and *petty bag* office, which both belong to the common-law court in chancery.†

But the extraordinary court, or court of equity, is now become the court of the greatest judicial consequence. This distinction between law and equity, as administered in different courts, is not at present known, nor seems to have ever been known, in any other country at any time : and yet the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the Romans ; the *jus prætorium*, or discretion of the prætor, being distinct from the *leges* or standing laws, but the power of both centred in one and the same magis-

† See 51 & 52 Vict. c. 65.

trate, who was equally entrusted to pronounce the rule of law, and to apply it to particular cases, by the principles of equity. With us too, the *aula regia*, which was the supreme court of judicature, undoubtedly administered equal justice according to the rules of both or either, as the case might chance to require: and, when that was broken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition. For though equity is mentioned by Bracton as a thing contrasted to strict law, yet neither in that writer, nor in Glanvil or Fleta, nor yet in Britton (composed under the auspices and in the name of Edward I., and treating particularly of courts and their several jurisdictions), is there a syllable to be found relating to the equitable jurisdiction of the court of chancery. It seems therefore probable, that when the courts of law, proceeding merely upon the ground of the king's original writs, and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the king in person assisted by his privy-council; (from whence also arose the jurisdiction of the court of requests which was virtually abolished by the statute 16 Car. I., ch. 10), and they were wont to refer the matter either to the chancellor and a select committee, or by degrees to the chancellor only, who mitigated the severity or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the custom not only among our Saxon ancestors, before the institution of the *aula regia*, but also after its dissolution, in the reign of King Edward I.; and perhaps during its continuance, in that of Henry II.

In these early times the chief judicial employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered. And to quicken the diligence of the clerks in the chancery, who were too much attached to ancient precedents, it is provided by statute Westm. 2, 13 Edw. I., ch. 24, that "whensoever from thenceforth in one case a writ shall be found in the chancery, and in a like case falling under the same right and requiring like remedy no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one; and, if they cannot agree, it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the

law, lest it happen for the future, that the court of our lord the king be deficient in doing justice to the suitors." And this accounts for the very great variety of writs of trespass on the case, to be met with in the register; whereby the suitor had ready relief, according to the exigency of his business, and adapted to the specialty, reason, and equity of his very case. Which provision (with a little accuracy in the clerks of the chancery, and a little liberality in the judges, by extending rather than narrowing the remedial effects of the writ) might have effectually answered all the purposes of a court of equity; except that of obtaining a discovery by the oath of the defendant.

But when, about the end of the reign of King Edward III., uses of land were introduced and, though totally discountenanced by the courts of common law, were considered as fiduciary deposits and binding in conscience by the clergy, the separate jurisdiction of the chancery as a court of equity began to be established, and John Waltham, who was bishop of Salisbury and chancellor to King Richard II., by a strained interpretation of the above mentioned statute of Westm. 2, devised the writ of *subpœna*, returnable in the court of chancery only, to make the feoffee to uses accountable to his *cestui que use*: which process was afterwards extended to other matters wholly determinable at the common law, upon false and fictitious suggestions; for which therefore the chancellor himself is by statute 17 Ric. II., ch. 6, directed to give damages to the party unjustly aggrieved. But as the clergy, so early as the reign of King Stephen, had attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits *pro læsione fidei*, as a spiritual offence against conscience, in case of non-payment of debts or any breach of civil contracts; till checked by the constitutions of Clarendon, which declared that, "*placita de debitis, quæ fide interposita debentur, vel absque interpositione fidei, sint in iustitia regis*:" therefore probably the ecclesiastical chancellors, who then held the seal, were remiss in abridging their own new acquired jurisdiction; especially as the spiritual courts continued to grasp at the same authority as before in suits *pro læsione fidei*, so late as the fifteenth century, till finally prohibited by the unanimous concurrence of all the judges. However, it appears from the parliament rolls, that in the reigns of Henry IV. and V., the commons were repeatedly urgent to have the writ of *subpœna*

entirely suppressed, as being a novelty derided by the subtlety of chancellor Waltham, against the form of the common law ; whereby no plea could be determined, unless by examination and oath of the parties, according to the form of the law civil, and the law of holy church, in subversion of the common law. But though Henry IV., being then hardly warm in his throne, gave a palliating answer to their petitions, and actually passed the statute 4 Hen. IV., ch. 23, whereby judgments at law are declared irrevocable unless by attainr or writ of error, yet his son put a negative at once upon their whole application : and in Edward IV.'s time the process by bill and *subpœna* was become the daily practice of the court.

But this did not extend very far : for in the ancient treatise, entitled *diversité des courtes*, supposed to be written very early in the sixteenth century, we have a catalogue of the matters of conscience then cognizable by *subpœna* in chancery, which fall within a very narrow compass. No regular judicial system at that time prevailed in the court ; but the suitor, when he thought himself aggrieved, found a desultory and uncertain remedy, according to the private opinion of the chancellor, who was generally an ecclesiastic, or sometimes (though rarely) a statesman : no lawyer having sat in the court of chancery from the times of the chief justices Thorpe and Knyvet, successively chancellors to King Edward III., in 1372 and 1373, to the promotion of Sir Thomas More by King Henry VIII., in 1530. After which the great seal was indiscriminately committed to the custody of lawyers, or courtiers, or churchmen, according as the convenience of the times and the disposition of the prince required, till Serjeant Puckering was made lord-keeper in 1592, from which time to the present the court of chancery has always been filled by a lawyer, excepting the interval from 1621 to 1625, when the seal was intrusted to Dr. Williams, then Dean of Westminster, but afterwards Bishop of Lincoln ; who had been chaplain to Lord Ellesmere, when chancellor.

In the time of Lord Ellesmere (A. D. 1616), arose that notable dispute between the courts of law and equity, set on foot by Sir Edward Coke, then chief justice of the court of king's bench ; whether a court of equity could give relief after or against a judgment at the common law ? This contest was so warmly carried on, that indictments were preferred against

the suitors, the solicitors, the counsel, and even a master in chancery, for having incurred a *præmunire*, by questioning in a court of equity a judgment in the court of king's bench, obtained by gross fraud and imposition. This matter being brought before the king, was by him referred to his learned counsel for their advice and opinion ; who reported so strongly in favor of the courts of equity, that his majesty gave judgment in their behalf ; but, not contented with the irrefragable reasons and precedents produced by his counsel (for the chief justice was clearly in the wrong), he chose rather to decide the question by referring it to the plenitude of his royal prerogative. Sir Edward Coke submitted to the decision, and thereby made atonement for his error : but this struggle, together with the business of *commendams* (in which he acted a very noble part) and his controlling the commissioners of sewers, were the open and avowed causes, first of his suspension, and soon after of his removal, from his office.

Lord Bacon, who succeeded Lord Ellesmere, reduced the practice of the court into a more regular system ; but did not sit long enough to effect any considerable revolution in the science itself : and few of his decrees which have reached us are of any great consequence to posterity. His successors, in the reign of Charles I., did little to improve upon his plan : and even after the Restoration the seal was committed to the Earl of Clarendon, who had withdrawn from practice as a lawyer near twenty years ; and afterwards to the Earl of Shaftesbury, who (though a lawyer by education) had never practiced at all. Sir Heneage Finch, who succeeded in 1673, and became afterwards Earl of Nottingham, was a person of the greatest abilities and most uncorrupted integrity ; a thorough master and zealous defender of the laws and constitution of his country, and endued with a pervading genius, that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade and the abolition of military tenures, co-operated in establishing his plan, and enabled him in the course of nine years to build a system of jurisprudence

and jurisdiction upon wide and rational foundations ; which have also been extended and improved by many great men, who have since presided in chancery. And from that time to this, the power and business of the court have increased to an amazing degree.

From this court of equity in chancery, as from the other superior courts, an appeal lies to the house of peers. But there are these differences between appeals from a court of equity, and writs of error from a court of law : 1. That the former may be brought upon any interlocutory matter, the latter upon nothing but only a definitive judgment ; 2. That on writs of error the house of lords pronounces the judgment, on appeals it gives direction to the court below to rectify its own decree.⁶

V. The next court that I shall mention is one that hath no original jurisdiction, but is only a court of appeal, to correct the errors of other jurisdictions. This is the court of exchequer chamber ; which was first erected by statute 31 Edw. III., ch. 12, to determine causes by writs of error from the common law side of the court of exchequer. And to that end it consists of the lord chancellor and lord treasurer, taking unto them the justices of the king's bench and common pleas. In imitation of which a second court of exchequer chamber was erected by statute 27 Eliz., ch. 8, consisting of the justices of the common pleas, and the barons of the exchequer, before whom writs of error may be brought to reverse judgments in certain suits originally begun in the court of king's bench. Into the court also of ex-

⁶ Before the enactment of the Supreme Court of Judicature Act, which went into effect in November, 1875, the organization of the English courts of equity was as follows : The equity judges consisted of three vice-chancellors, a master of the rolls, two lords-justices, and the lord-chancellor. The vice-chancellors and the master of the rolls held each separate courts of original jurisdiction ; so that there were four tribunals for the hearing of equitable causes in the first instance. Appeals might be taken from either court to the Court of Appeal in Chancery, or to the lord-chancellor. The Court of Appeal was composed of the lords-justices and the lord-chancellor, but it was generally held by the lords-justices alone. Any one of these three judges, however, might in many cases act alone in the exercise of appellate jurisdiction ; moreover, the lord-chancellor had an independent jurisdiction, without sitting as a member of the court of appeals. A second appeal might be taken to the House of Lords. The changes effected in this organization of the courts, by the recent act, are stated in note 9, *post*.

exchequer chamber (which then consists of all the judges of the three superior courts, and now and then the lord chancellor also), are sometimes adjourned from the other courts such causes, as the judges upon argument find to be of great weight and difficulty, before any judgment is given upon them in the court below.⁶

From all the branches of this court of exchequer chamber, a writ of error lies to :—

VI. The house of peers, which is the supreme court of judicature in the kingdom, having at present no original jurisdiction over causes, but only upon appeals and writs of error, to rectify any injustice or mistake of the law, committed by the courts below.⁷ To this authority this august tribunal succeeded of course upon the dissolution of the *aula regia*. For, as the barons of parliament were constituent members of that court; and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside; it followed, that the right of receiving appeals, and superintending all other jurisdictions, still remained in the residue of that noble assembly, from which every other great court was derived. They are therefore in all causes the last resort, from whose judgment no farther appeal is permitted; but every subordinate tribunal must conform to their determinations; the law reposing an entire confidence in the honor and conscience of the noble persons who compose this important assembly, that (if possible) they will make themselves masters of those questions which they undertake to decide, and in all dubious cases refer themselves to the opinions of the judges, who are summoned by writ to advise them; since upon their decision all property must finally depend.⁸

⁶ As to the change subsequently made in the organization of the Exchequer Chamber, see *ante*, note 3.

⁷ Though the entire House of Lords constitutes nominally the final court of appeal, yet, in practice, the exercise of these judicial functions is committed to a small number of members, who are termed "Lords of Appeal." The Lord Chancellor is one of the number, while the others are usually such persons as occupy or have occupied high judicial offices. Two in number are specially appointed to the office under the title of "Lords of Appeal in Ordinary," and ultimately two more having this title will be appointed. Three judges are required to constitute a quorum. (39 & 40 Vict. c. 59.)

⁸ Reference should also be made, at this point, to the judicial tribunal, known as the "Judicial Committee of the Privy Council." This has exclusive jurisdiction of appeals from the ecclesiastical courts, and of appeals coming

VII. Before I conclude this chapter, I must also mention another species of courts, of general jurisdiction and use, which are derived out of, and act as collateral auxiliaries to, the foregoing; I mean the courts of assize and *nisi prius*.

These are composed of two or more commissioners, who are twice in every year sent by the king's special commission all round the kingdom (except London and Middlesex, where courts of *nisi prius* are holden in and after every term, before the chief or other judge of the several superior courts), to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of Westminster hall. These judges of assize came into use in the room of the ancient justices in eyre, *justiciarii in itinere*; who were regularly established, if not first appointed, by the parliament of Northampton, A. D. 1176, 22 Hen. II., with a delegated power from the king's great court, or *aula regia*, being looked upon as members thereof; and they afterwards made their circuit round the kingdom once in seven years for the purpose of trying causes. They were afterwards directed by *magna charta*, ch. 12, to be sent into every county once a year, to take (or receive the verdict of the jurors or recognitors in certain actions, then called) recognitions or assizes; the most difficult of which they are directed to adjourn into the court of common pleas, to be there determined. The itinerant justices were sometimes mere justices of assize or of dower, or of gaol-delivery, and the like; and they had sometimes a more general commission, to determine all manner of causes, being constituted *justiciarii ad omnia placita*: but the present justices of assize and *nisi prius* are more immediately derived from the statute Westm. 2, 13 Edw. I., ch. 30, which directs them to be assigned out of the king's sworn justices, associating to themselves one or two discreet knights of each county. By statute 27 Edw. I., ch. 4 (explained by 12 Edw. II., ch. 3) assizes and inquests were allowed to be taken before any one justice of the court in which the plea was brought; associating to him one knight or other approved man of the county. And, from the Colonies. It consists of a lord-president, the lord-chancellor, the lord chief justice of England, the lords of appeal in ordinary and the lords justices of appeal (if of the Queen's Privy Council), the master of the rolls, and certain other members to the number of twenty or more in all. Four are sufficient to form a quorum. No appeal lies from the Privy Council to the House of Lords; and its decisions are, therefore, final, within its special range of jurisdiction.

lastly, by statute 14 Edw. III., ch. 16, inquests of *nisi prius* may be taken before any justice of either bench (though the plea be not depending in his own court), or before the chief baron of the exchequer, if he be a man of the law ; or otherwise before the justices of assize, so that one of such justices be a judge of the king's bench or common pleas, or the king's serjeant sworn. They usually make their circuits in the respective vacations after Hilary and Trinity terms ; assizes being allowed to be taken in the holy time of Lent by consent of the bishops at the king's request, as expressed in statute Westm. 1, 3 Edw. I., ch. 51. And it was also usual during the times of popery, for the prelates to grant annual licenses to the justices of assize to administer oaths in holy times : for oaths being of a sacred nature, the logic of those deluded ages concluded that they must be of ecclesiastical cognizance. The prudent jealousy of our ancestors ordained, that no man of law should be judge of assize in his own county, wherein he was born or doth inhabit ; and a similar prohibition is found in the civil law, which has carried this principle so far that it is equivalent to the crime of sacrilege, for a man to be governor of the province in which he was born, or has any civil connection.

The judges upon their circuits now sit by virtue of five several authorities. 1. The commission of the *peace*. 2. A commission of *oyer and terminer*. 3. A commission of general *gaol-delivery*. The consideration of all which belongs properly to the subsequent book of these Commentaries. But the fourth commission is, 4. A commission of *assize*, directed to the justices and serjeants therein named, to take (together with their associates) assizes in the several counties ; that is, to take the verdict of a peculiar species of jury, called an assize, and summoned for the trial of *landed* disputes, of which hereafter. The other authority is, 5. That of *nisi prius*, which is a consequence of the commission of *assize*, being annexed to the office of those justices by the statute of Westm., 2, 13 Edw. I., ch. 30, and it empowers them to try all questions of fact issuing out of the courts of Westminster, that are then ripe for trial by jury. These by the course of the courts are usually appointed to be tried at Westminster in some Easter or Michaelmas term, by a jury returned from the county wherein the cause of action arises ; but with this proviso, *nisi prius*, unless before the day prefixed the judges of assize come into the county.

in question. This they are sure to do in the vacations preceding each Easter and Michaelmas term, which saves much expense and trouble. These commissions are constantly accompanied by writs of *association*, in pursuance of the statutes of Edward I. and II., before mentioned ; whereby certain persons (usually the clerk of assize and his subordinate officers) are directed to associate themselves with the justices and serjeants, and they are required to admit the said persons into their society, in order to take the assizes, &c. ; that a sufficient supply of commissioners may never be wanting. But, to prevent the delay of justice by the absence of any of them, there is also issued of course a writ of *si non omnes* ; directing that if all cannot be present, any two of them (a justice or a serjeant being one) may proceed to execute the commission.

These are the several courts of common law and equity, which are of public and general jurisdiction throughout the kingdom.⁹ And, upon the whole, we cannot but admire the wise

⁹ An entire reorganization of the English courts has been effected by the enactment of a statute known as the "Supreme Court of Judicature Act," which went into force in November, 1875. A brief outline of the provisions of this act and amendatory acts is as follows : It is declared that most existing courts shall constitute a single tribunal, known as the "Supreme Court of Judicature." This is divided into two divisions, one of which is called "Her Majesty's High Court of Justice," the other, "Her Majesty's Court of Appeal." The former exercises chiefly original jurisdiction, while the latter possesses appellate powers. The appellate jurisdiction of the House of Lords is retained, and it hears appeals from the Court of Appeal and from Irish and Scotch courts. (See note 7.) The High Court consists of judges who formerly belonged to the courts whose jurisdiction has been transferred to the High Court (see *post*), together with the successors of such former judges as have died or vacated office ; provision has also been made for the appointment of a few additional judges of this court ; the master of the rolls ceased to be a member of this court in 1881, nor is the lord-chancellor deemed a permanent member. The Court of Appeal consists of nine judges, four of whom are judges *ex officio*, and five *ordinary* judges. The *ex officio* judges are the lord-chancellor, the master of the rolls, the lord chief justice of England (who presides over the Queen's Bench Division), and the judge of the Court of Probate. The ordinary judges of this court are known as "lords justices of appeal."

The High Court of Justice was at first (in 1875) subdivided into five divisions, corresponding in the main to the previously existing tribunals whose jurisdiction it received. One division consisted of equity judges belonging to the High Court and was termed the Chancery Division. The other divisions were the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce and Admiralty Division. These divisions

economy and admirable provision of our ancestors, in settling the distribution of justice in a method so well calculated for cheapness, expedition, and ease. By the constitution which they established, all trivial debts, and injuries of small consequence, were to be recovered or redressed in every man's own county, hundred, or perhaps parish. Pleas of freehold, and more important disputes of property, were adjourned to the king's court of common pleas, which was fixed in one place for the benefit of the whole kingdom. Crimes and misdemeanors were to be examined in a court by themselves ; and matters of the revenue in another distinct jurisdiction. Now, indeed, for the ease of the subject and greater dispatch of causes, methods have been found to open all the three superior courts for the redress of private wrongs ; which have remedied many inconveniences, and

were really the former courts, continued as sections of the High Court, though with considerable change of powers ; but the last division named was composed of the judge of the former Court of Probate and the judge of the Court of Admiralty. But in 1881 the three common-law divisions were consolidated into one, *viz.* the Queen's Bench Division, so that now there are but three divisions in all. The offices of lord chief justice of the Common Pleas, and lord chief baron of the Exchequer are abolished. Judges may be transferred from one division to another by the Crown. The jurisdiction of these various divisions is much the same as that of the corresponding courts formerly ; but, in one respect, there has been a very important extension of power. It is provided by the act that in every civil cause or matter entertained by the Supreme Court of Judicature, law and equity shall be concurrently administered, and that equitable rules shall supersede those of the law, when any conflict arises. This gives the common-law division important equitable powers which it did not previously possess. But causes of action which are peculiarly equitable in their nature are brought before the Chancery Division.

Subject to rules of court, it is provided that the plaintiff in any action may assign it to any proper division he may choose by so endorsing his papers. If an improper assignment is made, a transfer may be made by the court. But probate, divorce, and admiralty matters must be assigned to that division. All actions and proceedings in the High Court are, as far as practicable, heard before a single judge. But such business as the rules of court may direct is transacted before divisional courts of the High Court. These consist ordinarily of two judges (though in special cases the number may be increased) and are distinct from the divisions previously mentioned. Any number of divisional courts may hold session at the same time. The Court of Appeal hears appeals from the various divisions of the High Court. When the appeal is from a final order or judgment, it is heard before not less than three judges ; when from an interlocutory order or judgment, before not less than two judges. The court may sit in two divisions at the same time.

Provision is also made for the holding of circuit courts throughout the kingdom, as formerly, by the judges and commissioners appointed for the purpose. (See 36 & 37 Vict. c. 66 ; 38 & 39 *id.* c. 77 ; 39 & 40 *id.* c. 59 ; 40 *id.* c. 9 ; 44 & 45 *id.* c. 68.)

yet preserved the forms and boundaries handed down to us from high antiquity. If facts are disputed, they are sent down to be tried in the country by the neighbors; but the law, arising upon those facts, is determined by the judges above: and, if they are mistaken in point of law, there remain in both cases two successive courts of appeal, to rectify such their mistakes. If the rigor of general rules does in any case bear hard upon individuals, courts of equity are open to supply the defects, but not sap the fundamentals, of the law. Lastly, there presides over all one great court of appeal, which is the last resort in matters both of law and equity; and which will therefore take care to preserve a uniformity and *equilibrium* among all the inferior jurisdictions: a court composed of prelates selected for their piety, and of nobles advanced to that honor for their personal merit, or deriving both honor and merit from an illustrious train of ancestors: who are formed by their education, interested by their property, and bound upon their conscience and honor, to be skilled in the laws of their country. This is a faithful sketch of the English juridical constitution, as designed by the masterly hand of our forefathers, of which the great original lines are still strong and visible; and if any of its minuter strokes are by the length of time at all obscured or decayed, they may still be with ease restored to their pristine vigor: and that not so much by fanciful alterations and wild experiments (so frequent in this fertile age), as by closely adhering to the wisdom of the ancient plan, concerted by Alfred, and perfected by Edward I., and by attending to the spirit, without neglecting the forms of their excellent and venerable institutions.¹⁰

¹⁰ THE COURTS OF THE UNITED STATES.—The Supreme Court of the United States was established by the Constitution, and, by various laws of Congress, subordinate tribunals have been established, which form a connected, interdependent series of courts, extending throughout the Union. The most important of these are the District Courts, and the Circuit Courts. The District Courts are at present (1890) about 65 in number. As a general rule, each State constitutes a district, but the larger and more populous states are divided into two or three districts. New districts are formed, from time to time, as new States are admitted to the Union. In each court there is a single judge, who must reside in his district. Their jurisdiction extends to admiralty or maritime causes of action; to suits for penalties or forfeitures under the U. S. laws; to postal law actions; to suits against national banks; to the trial of crimes and offences against the United States, not attended with capital punishment; to actions against consuls, and to va-

CHAPTER IV.

[BL. COMM —BOOK III. CH. V.]

Of Courts Ecclesiastical, and Maritime.

BESIDES the several courts which were treated of in the preceding chapter, and in which all injuries are redressed, that fall under the cognizance of the common law of England, or that

rious other cases. Appeals are generally taken to the circuit courts, though sometimes they lie directly to the Supreme Court.

The Judicial Circuits are nine in number, each circuit consisting of several States, and Circuit Courts are established, there being in general one for each district. Each of the nine justices of the Supreme Court is allotted to one of the circuits, and is required to attend at least one term of the circuit court in each district in his circuit during every period of two years. A special circuit judge is also appointed in each circuit, who must reside within its limits. Circuit Courts are held by the Supreme Court justice allotted to the circuit, or by the circuit judge, or by the district judge of the district, or by any two of these judges sitting together. The jurisdiction of these courts is both original and appellate. Their original jurisdiction (concurrent with that of the State courts) extends to civil suits in law or equity, where the matter in dispute exceeds \$2000, and arising under the U. S. Constitution or laws, or under treaties, or involving a controversy between citizens of different states or between citizens and foreigners, etc.; it also extends to suits by the United States, to suits against national banks, to questions of revenue, of civil rights, to patent and copyright cases, to certain criminal prosecutions, etc. They have appellate jurisdiction to hear appeals from the District Courts in admiralty and maritime causes (except prize causes) and in civil actions, provided in all these cases the matter in dispute, exclusive of costs, exceeds \$50; also in certain criminal cases. Appeals are taken to the Supreme Court. Certain actions may be removed from the State courts to the circuit courts. (Acts of Congress of Mar. 3, 1887, Aug. 13, 1888.)

The Supreme Court is composed of a chief-justice and eight associate justices, of whom six constitute a quorum. One term is held yearly in Washington. The jurisdiction is both original and appellate, but chiefly the latter. It has original jurisdiction in cases affecting ambassadors, other public ministers, consuls, and in actions to which a State is a party. Appeals are taken to this court from the circuit courts, and from certain district courts with circuit court powers, from judgments of \$5000 or more, upon questions of jurisdiction, etc. Besides, if decisions rendered in the highest appellate courts of the various States are in conflict with the Constitution treaties or laws of the United States, they may be appealed to the Supreme Court. So appeals from Territorial courts are heard here.

Each of the respective American States has its own system of court organization, which must be ascertained by reference to the statutes of such States. It would be impracticable to give an account of such diverse systems in this connection.

spirit of equity, which ought to be its constant attendant, there still remain some other courts of a jurisdiction equally public and general ; which take cognizance of other species of injuries, of an ecclesiastical, and maritime nature ; and therefore are properly distinguished by the title of ecclesiastical courts, and courts maritime.

I. Before I descend to consider particular ecclesiastical courts, I must first of all in general premise, that in the time of our Saxon ancestors there was no sort of distinction between the lay and the ecclesiastical jurisdiction : the county-court was as much a spiritual as a temporal tribunal : the rights of the church were ascertained and asserted at the same time, and by the same judges, as the rights of the laity. For this purpose the bishop of the diocese, and the alderman, or in his absence the sheriff of the county, used to sit together in the county-court, and had there the cognizance of all causes, as well ecclesiastical as civil : a superior deference being paid to the bishop's opinion in spiritual matters, and to that of the lay judges in temporal. This union of power was very advantageous to them both ; the presence of the bishop added weight and reverence to the sheriff's proceedings ; and the authority of the sheriff was equally useful to the bishop, by enforcing obedience to his decrees in such refractory offenders, as would otherwise have despised the thunder of mere ecclesiastical censures.

But so moderate and rational a plan was wholly inconsistent with those views of ambition, that were then forming by the court of Rome. It soon became an established maxim in the papal system of policy, that all ecclesiastical persons, and all ecclesiastical causes, should be solely and entirely subject to ecclesiastical jurisdiction only : which jurisdiction was supposed to be lodged in the first place and immediately in the pope, by divine indefeasible right and investiture from Christ himself ; and derived from the pope to all inferior tribunals. Hence the canon law lays it down as a rule, that "*sacerdotes a regibus honorandi sunt, non judicandi* ;" and places an emphatic reliance on a fabulous tale which it tells of the Emperor Constantine : that when some petitions were brought to him, imploring the aid of his authority against certain of his bishops, accused of oppression and injustice, he caused (says the holy canon) the petitions to be burnt in their presence, dismissing them with this

valediction ; “ *ite et inter vos causas vestras discutite, quia dignum non est ut nos judicemus Deos.*”

It was not however till after the Norman Conquest, that this doctrine was received in England ; when William I. (whose title was warraly espoused by the monasteries, which he liberally endowed, and by the foreign clergy, whom he brought over in shoals from France and Italy, and planted in the best preferments of the English Church), was at length prevailed upon to establish this fatal encroachment, and separate the ecclesiastical court from the civil : whether actuated by the principles of bigotry, or by those of a more refined policy, in order to discountenance the laws of King Edward, abounding with the spirit of Saxon liberty, is not altogether certain. But the latter, if not the cause, was undoubtedly the consequence of this separation : for the Saxon laws were soon overborne by the Norman justiciaries, when the county-court fell into disregard by the bishop's withdrawing his presence, in obedience to the charter of the Conqueror ; which prohibited any spiritual cause from being tried in the secular courts, and commanded the suitors to appear before the bishop only, whose decisions were directed to conform to the canon law.

King Henry the First, at his accession, among other restorations of the laws of King Edward the Confessor, revived this of the union of the civil and ecclesiastical courts. Which was, according to Sir Edward Coke, after the great heat of the Conquest was past, only a restitution of the ancient law of England. This however was ill-relished by the popish clergy, who, under the guidance of that arrogant prelate, archbishop Anselm, very early disapproved of a measure that put them on a level with the profane laity, and subjected spiritual men and causes to the inspection of the secular magistrates : and therefore in their synod at Westminster, 3 Hen. I., they ordained that no bishop should attend the discussion of temporal causes ; which soon dissolved this newly effected union. And when, upon the death of King Henry the First, the usurper Stephen was brought in and supported by the clergy, we find one article of the oath which they imposed upon him was, that ecclesiastical persons and ecclesiastical causes should be subject only to the bishop's jurisdiction. And as it was about that time that the contest and emulation began between the laws of England and those of Rome. the temporal courts adhering to the former, and the spiritual

adopting the latter as their rule of proceeding, this widened the breach between them, and made a coalition afterwards impracticable ; which probably would else have been effected at the general reformation of the church.

In briefly recounting the various species of ecclesiastical courts, or, as they are often styled, courts Christian (*curiæ Christianitatis*) I shall begin with the lowest, and so ascend gradually to the supreme court of appeal.

1. The *archdeacon's* court is the most inferior court in the whole ecclesiastical polity. It is held in the archdeacon's absence before a judge appointed by himself, and called his official ; and its jurisdiction is sometimes in concurrence with, sometimes in exclusion of, the bishop's court of the diocese. From hence, however, by statute 24 Hen. VIII., ch. 12, an appeal lies to that of the bishop.

2. The *consistory* court of every diocesan bishop is held in their several cathedrals, for the trial of all ecclesiastical causes arising within their respective dioceses. The bishop's chancellor, or his commissary, is the judge ; and from his sentence an appeal lies, by virtue of the same statute, to the archbishop of each province respectively.

3. The court of *arches* is a court of appeal belonging to the archbishop of Canterbury ; whereof the judge is called the *dean of the arches*, because he anciently held his court in the church of Saint Mary *le bow* (*sancta Maria de arcubus*), though all the principal spiritual courts are now holden at doctors' commons. His proper jurisdiction is only over the thirteen peculiar parishes belonging to the archbishop in London ; but the office of dean of the arches having been for a long time united with that of the archbishop's principal official, he now, in right of the last-mentioned office (as doth also the official principal of the archbishop of York), receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. And from him an appeal lies to the king in chancery (that is, to a court of delegates appointed under the king's great seal), by statute 25 Hen. VIII., ch. 19, as supreme head of the English Church, in the place of the bishop of Rome, who formerly exercised this jurisdiction ; which circumstance alone will furnish the reason why the popish clergy were so anxious to separate the spiritual court from the temporal.

4. The court of *peculiars* is a branch of and annexed to the court of arches. It has a jurisdiction over all those parishes dispersed through the province of Canterbury in the midst of other dioceses, which are exempt from the ordinary's jurisdiction, and subject to the metropolitan only. All ecclesiastical causes, arising within these peculiar or exempt jurisdictions, are originally cognizable by this court; from which an appeal lay formerly to the pope, but now by the statute 25 Hen. VIII., ch. 19, to the king in chancery.

5. The *prerogative* court is established for the trial of all testamentary causes, where the deceased hath left *bona notabilia* within two different dioceses. In which case the probate of wills belongs to the archbishop of the province, by way of special prerogative. And all causes relating to the wills, administrations, or legacies of such persons are, originally, cognizable herein, before a judge appointed, by the archbishop, called the judge of the prerogative court; from whom an appeal lies by statute 25 Hen. VIII., ch. 19, to the king in chancery, instead of the pope, as formerly.

6. The great court of appeal in all ecclesiastical causes, *viz.*, the court of *delegates*, *judices delegati*, appointed by the king's commission under his great seal, and issuing out of chancery, to represent his royal person, and hear all appeals to him by virtue of the before-mentioned statute of Henry VIII. This commission is frequently filled with lords, spiritual and temporal, and always with judges of the courts at Westminster, and doctors of the civil law. But in case the king himself be party in any of these suits, the appeal does not then lie to him in chancery, which would be absurd; but, by the statute 24 Hen. VIII., ch. 12, to all the bishops of the realm, assembled in the upper house of convocation.¹

7. A commission of *review* is a commission sometimes granted, in extraordinary cases, to revise the sentence of the court of delegates; when it is apprehended they have been led into a material error. This commission the king may grant, although the statutes 24 & 25 Hen. VIII., before cited, declare the sentence of the delegate definitive: because the pope as

¹ The jurisdiction of the court of delegates was afterwards transferred to the judicial committee of the Privy Council. See note 8, in the preceding chapter.

supreme head by the canon law used to grant such commission of review ; and such authority as the pope heretofore exerted, is now annexed to the crown by statutes 26 Hen. VIII., ch. 1, and 1 Eliz., ch. 1. But it is not matter of right, which the subject may demand *ex debito justitiæ* ; but merely a matter of favor, and which therefore is often denied.²

II. The maritime courts, or such as have power and jurisdiction to determine all maritime injuries, arising upon the seas, or in parts out of the reach of the common law, are only the court of admiralty, and its courts of appeal. According to Sir Henry Spelman, and Lambard, it was first of all erected by King Edward the Third. Its proceedings are according to the method of the civil law, like those of the ecclesiastical courts ; upon which account it is usually held at the same place with the superior ecclesiastical courts, at doctors' commons in London. It is no court of record, any more than the spiritual courts. From the sentences of the admiralty judge an appeal always lay, in ordinary course, to the king in chancery, as may be collected from statute 25 Henry VIII., ch. 19, which directs the appeal from the archbishop's courts to be determined by persons named in the king's commission, "like as in case of appeal from the admiral court." But this is also expressly declared by statute 8 Eliz., ch. 5, which enacts, that upon appeal made to the chancery, the sentence definitive of the delegates appointed by commission shall be final.

Appeals from the vice-admiralty courts in America, and our other plantations and settlements, may be brought before the courts of admiralty in England, as being a branch of the admiral's jurisdiction, though they may also be brought before the king in council. But in case of prize vessels, taken in time of

² This account of the ecclesiastical courts has been retained, in an abbreviated form, on account of its historical importance ; but very extensive changes have been made in the organization and jurisdiction of these courts, which have deprived them of much of their former importance. The principal ecclesiastical courts now existing are the consistory courts of the bishop of each diocese, and the Court of Arches, which sits at Westminster. Their chief jurisdiction extends to the trial of charges of heresy, of improperly conducting the service of the Church, and of immoral and scandalous conduct on the part of clergymen. A final appeal lies from the Court of Arches to the Committee of the Privy Council. There are no similar tribunals in this country.

war, in any part of the world, and condemned in any courts of admiralty or vice-admiralty as lawful prize, the appeal lies to certain commissioners of appeals consisting chiefly of the Privy Council, and not to judges-delegates. And this by virtue of divers treaties with foreign nations; by which particular courts are established in all the maritime countries of Europe for the decision of this question, whether lawful prize or not: for this being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of either country, to determine it. The original court, to which this question is permitted in England, is the court of admiralty; and the court of appeals is in effect the king's privy council, the members of which are, in consequence of treaties, commissioned under the great seal for this purpose.⁸

⁸ The organization of the High Court of Admiralty has been changed, and its jurisdiction extended by recent statutes. It is now held by a special admiralty judge, instead of by the Lord High Admiral, as formerly. Appeals are taken to Her Majesty's Court of Appeal. It has been united with the Court of Probate and Divorce to form a special division of the High Court of Justice (see note 9, preceding chapter), but admiralty causes are still heard independently by the admiralty judge. "The suits usually entertained by the court are for the purpose of enforcing bottomry or respondentia bonds; to obtain salvage awards; to enforce the payment of money due for necessities supplied to a ship, or for wages due to the master or crew, or for towage or pilotage services; to recover damages in cases of collision, and of damage done by any ship; also, in cases of damage to goods, or in respect of breaches of contract, where the owners of the vessel are domiciled abroad. The court also entertains questions of prize and booty of war, but it exercises this jurisdiction by virtue of a warrant issued for that purpose, giving it special jurisdiction in that behalf." (Broom & Hadley's Comm., iii. 435.)

In the United States, jurisdiction in admiralty and maritime causes is vested exclusively in the United States courts. (See note 11, preceding chapter.)

CHAPTER V.

[BL. COMM.—BOOK III. CH. VII.]

Of the Cognizance of Private Wrongs.

WE are now to proceed to the cognizance of private wrongs; that is, to consider in which of the vast variety of courts, mentioned in the three preceding chapters, every possible injury that can be offered to a man's person or property is certain of meeting with redress.

The authority of the several courts of private and special jurisdiction, or of what wrongs such courts have cognizance, was necessarily remarked as those respective tribunals were enumerated; and therefore need not be here again repeated; which will confine our present inquiry to the cognizance of civil injuries in the several courts of public or general jurisdiction. And the order, in which I shall pursue this inquiry, will be by showing : 1. What actions may be brought, or what injuries remedied, in the ecclesiastical courts. 2. What in the maritime. 3. What in the courts of common law.

And, with regard to the two first of these particulars, I must beg leave not so much to consider what hath at any time been *claimed* or pretended to belong to their jurisdiction, by the officers and judges of those respective courts; but what the common law *allows* and permits to be so. For these eccentric tribunals (which are principally guided by the rules of the imperial and canon laws), as they subsist and are admitted in England, not by any right of their own, but upon bare sufferance and toleration from the municipal laws, must have recourse to the laws of that country wherein they are thus adopted, to be informed how far their jurisdiction extends, or what causes are permitted, and what forbidden, to be discussed or drawn in question before them. It matters not therefore what the pandects of Justinian, or the decretals of Gregory, have ordained. They are here of no more intrinsic authority than the laws of Solon and

Lycurgus: curious perhaps for their antiquity, respectable for their equity, and frequently of admirable use in illustrating a point of history. Nor is it at all material in what light other nations may consider this matter of jurisdiction. Every nation must and will abide by its own municipal laws; which various accidents conspire to render different in almost every country in Europe. We permit some kinds of suits to be of ecclesiastical cognizance, which other nations have referred entirely to the temporal courts; as concerning wills and successions to intestates' chattels: and perhaps we may, in our turn, prohibit them from interfering in some controversies, which on the continent may be looked upon as merely spiritual. In short, the common law of England is the one uniform rule to determine the jurisdiction of our courts: and, if any tribunals whatsoever attempt to exceed the limits so prescribed them, the king's courts of common law may and do prohibit them; and in some cases punish their judges.

Having premised this general caution, I proceed now to consider:—

I. The wrongs or injuries cognizable by the ecclesiastical courts. I mean such as are offered to private persons or individuals; which are cognizable by the ecclesiastical court, not for reformation of the offender himself or party *injuring* (*pro salute animæ*, as is the case with immoralities in general, when unconnected with private injuries), but for the sake of the party *injured*, to make him a satisfaction and redress for the damage which he has sustained. And these I shall reduce under three general heads; of causes *pecuniary*, causes *matrimonial*, and causes *testamentary*.

1. Pecuniary causes, cognizable in the ecclesiastical courts, are such as arise either from the withholding ecclesiastical dues, or the doing or neglecting some act relating to the church, whereby some damage accrues to the plaintiff; towards obtaining a satisfaction for which he is permitted to institute a suit in the spiritual court.

2. Matrimonial causes, or injuries respecting the rights of marriage, are another, and a much more undisturbed, branch of the ecclesiastical jurisdiction. Though, if we consider marriages in the light of mere civil contracts, they do not seem to be properly of spiritual cognizance. But the Romanists having very

early converted this contract into a holy sacramental ordinance, the church of course took it under her protection, upon the division of the two jurisdictions.

Of matrimonial causes, one of the first and principal is, 1. *Causa jactitationis matrimonii*; when one of the parties boasts or gives out that he or she is married to the other, whereby a common reputation of their matrimony may ensue. On this ground the party injured may libel the other in the spiritual court; and, unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head; which is the only remedy the ecclesiastical courts can give for this injury. 2. Another species of matrimonial causes was, when a party contracted to another brought a suit in the ecclesiastical court to compel a celebration of the marriage in pursuance of such contract; but this branch of causes is now cut off entirely by the act for preventing clandestine marriages, 26 Geo. II., ch. 33, which enacts, that for the future no suit shall be had in any ecclesiastical court, to compel a celebration of marriage *in facie ecclesiæ*, for or because of any contract of matrimony whatsoever. 3. The suit for *restitution of conjugal rights* is also another species of matrimonial causes: † which is brought whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason; in which case the ecclesiastical jurisdiction will compel them to come together again, if either party be weak enough to desire it, contrary to the inclination of the other. 4. *Divorces* also, of which, and their several distinctions, we treated at large in a former book, are causes thoroughly matrimonial, and cognizable by the ecclesiastical judge. If it becomes improper, through some supervenient cause arising *ex post facto*, that the parties should live together any longer; as through intolerable cruelty, adultery, a perpetual disease, and the like; this unfitness or inability for the marriage state may be looked upon as an injury to the suffering party; and for this the ecclesiastical law administers the remedy of separation, or a divorce *a mensa et thoro*. But if the cause existed previous to the marriage, and was such a one as rendered the marriage unlawful *ab initio*, as consanguinity, corporal imbecility, or the like; in this case the law looks upon the marriage to have been always null and void, being contracted *in fraudem legis*, and decrees not

† As to the present English law, see 47 & 48 Vict. c. 68; *Smith v. Smith*, 15 P. D. 47.

only a separation from bed and board, but a *vinculo matrimonii* itself. 5. The last species of matrimonial causes is a consequence drawn from one of the species of divorce, that a *mensa et thoro*; which is the suit for *alimony*, a term which signifies maintenance: which suit the wife, in case of separation, may have against her husband, if he neglects or refuses to make her an allowance suitable to their station in life. This is an injury to the wife, and the court Christian will redress it by assigning her a competent maintenance, and compelling the husband by ecclesiastical censures to pay it. But no alimony will be assigned in case of a divorce for adultery on her part; for as that amounts to a forfeiture of her dower after his death, it is also a sufficient reason why she should not be partaker of his estate when living.†

3. Testamentary causes are the only remaining species belonging to the ecclesiastical jurisdiction; which as they are certainly of a mere temporal nature, may seem at first view a little oddly ranked among matters of a spiritual cognizance. And indeed (as was in some degree observed in a former book), they were originally cognizable in the king's courts of common law, *viz.*, the county courts; and afterwards transferred to the jurisdiction of the church, by the favor of the crown, as a natural consequence of granting to the bishops the administration of intestates' effects.

This spiritual jurisdiction of testamentary causes is a peculiar constitution of this island; for in almost all other (even in popish) countries all matters testamentary are under the jurisdiction of the civil magistrate. At what period of time the ecclesiastical jurisdiction of testaments and intestacies began in England, is not ascertained by any ancient writer. We find it indeed frequently asserted in our common law books, that it is but of *late years* that the church hath had the probate of wills. But this must only be understood to mean that it hath not *always* had this prerogative: for certainly it is of very high antiquity.

This jurisdiction, we have seen, is principally exercised with us in the consistory courts of every diocesan bishop, and in the prerogative court of the metropolitan, originally; and in the arches court and court of delegates, by way of appeal. It is divisible into three branches; the probate of wills, the granting

† See *ante*, p. 151, note 15; p. 153, note 17.

of administrations, and the suing for legacies. Subtraction, the withholding or detaining of legacies, is also still more apparently injurious, by depriving the legatees of that right, with which the laws of the land and the will of the deceased have invested them: and therefore, as a consequential part of testamentary jurisdiction, the spiritual court administers redress herein, by compelling the executor to pay them. But in this last case the courts of equity exercise a concurrent jurisdiction with the ecclesiastical courts, as incident to some other species of relief prayed by the complainant; as to compel the executor to account for the testator's effects, or assent to the legacy, or the like. For, as it is beneath the dignity of the king's courts to be merely ancillary to other inferior jurisdictions, the cause when once brought there, receives there also its full determination.

These are the principal injuries for which the party grieved either must, or may, seek his remedy in the spiritual courts.¹ But before I entirely dismiss this head, it may not be improper to add a short word concerning the *method of proceeding* in these tribunals, with regard to the redress of injuries.

The proceedings in the ecclesiastical courts are regulated according to the practice of the civil and canon laws; or rather according to a mixture of both, corrected and new-modelled by their own particular usages, and the interposition of the courts of common law. For, if the proceedings in the spiritual court be ever so regularly consonant to the rules of the Roman law, yet if they be manifestly repugnant to the fundamental maxims of

¹ The jurisdiction which the ecclesiastical courts formerly possessed has, in recent times, been much limited. Their jurisdiction in *pecuniary* causes has been rendered of but little importance by changes in the law; while, in *matrimonial* and *testamentary* causes, their jurisdiction has been transferred to a newly established court, *viz.*: the Probate, Divorce, and Admiralty Division of the High Court of Justice. The powers of this latter court are more extensive than those possessed by the ecclesiastical courts, its methods of relief are more efficacious and salutary, and the modes of procedure have been simplified, and rendered more practically convenient. But it is impracticable to give any sufficiently comprehensive statement of the nature and extent of its jurisdiction. The present jurisdiction of the ecclesiastical courts has been already stated. (See note 2, preceding chapter; also note 2, p. 142.)

Similar jurisdiction, in matrimonial causes, is generally vested in this country in courts of equity, or in courts having equitable powers; while testamentary causes are committed to special courts, known as probate or surrogate courts, orphans' courts, etc.

the municipal laws, to which upon principles of sound policy the ecclésiastical process ought in every state to conform (as if they require two witnesses to prove a fact, where one will suffice at common law): in such cases a prohibition will be awarded against them. But, under these restrictions, their ordinary course of proceeding is; first, by *citation*, to call the party injuring before them. Then, by *libel*, *libellus*, a little book, or by articles drawn out in a formal *allegation*, to set forth the complainant's ground of complaint. To this succeeds the *defendant's answer* upon oath, when, if he denies or extenuates the charge, they proceed to *proofs* by witnesses examined, and their depositions taken down in writing, by an officer of the court. If the defendant has any circumstances to offer in his defence, he must also propound them in what is called his *defensive allegation*, to which he is entitled in his turn to the *plaintiff's answer* upon oath, and may from thence proceed to *proofs* as well as his antagonist. When all the pleadings and proofs are concluded, they are referred to the consideration, not of a jury, but of a single judge: who *takes information* by hearing advocates on both sides, and thereupon forms his *interlocutory decree* or *definitive sentence* at his own discretion: from which there generally lies an *appeal*, in the several stages mentioned in a former chapter; though if the same be not appealed from in fifteen days, it is final, by the statute 25 Hen. VIII., ch. 19.

But the point in which these jurisdictions are the most defective, is that of enforcing their sentences when pronounced; for which they have no other process but that of *excommunication*; which is described to be twofold; the less, and the greater excommunication. The less is an ecclesiastical censure, excluding the party from the participation of the sacraments: the greater proceeds farther, and excludes him not only from these, but also from the company of all Christians. But, if the judge of any spiritual court excommunicates a man for a cause of which he hath not the legal cognizance, the party may have an action against him at common law, and he is also liable to be indicted at the suit of the king; by the common law an excommunicated person is disabled to do any act, that is required to be done by one that is *probus et legalis homo*. He cannot serve upon juries, cannot be a witness in any court, and, which is the worst of all, cannot bring an action, either real or personal, to recover lands or money due to him. §

§ These civil disabilities resulting from excommunication were abolished in 1813.

II. Injuries cognizable by the courts maritime, or admiralty courts, are the next object of our inquiries.² These courts have jurisdiction and power to try and determine all maritime causes ; or such injuries, which, though they are in their nature of common law cognizance, yet being committed on the high seas, out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. All admiralty causes must be therefore causes arising wholly upon the sea, and not within the precincts of any county. If part of any contract, or other cause of action, doth arise upon the sea, and part upon the land, the common law excludes the admiralty court from its jurisdiction ; for, part belonging properly to one cognizance and part to another, the common or general law takes place of the particular. Therefore, though pure maritime acquisitions, which are earned and become due on the high seas, as seamen's wages are one proper object of the admiralty jurisdiction, even though the contract for them be made upon land : yet, in general, if there be a contract made in England and to be executed upon the seas, as a charter-party or covenant that a ship shall sail to Jamaica, or shall be in such a latitude by such a day ; or a contract made upon the sea to be performed in England, as a bond made on shipboard to pay money in London or the like ; these kinds of mixed contracts belong not to the admiralty jurisdiction, but to the courts of common law.

The proceedings of the courts of admiralty bear much resemblance to those of the civil law, but are not entirely founded thereon ; and they likewise adopt and make use of other laws, as occasion requires ; such as the Rhodian laws and the laws of Oleron. For the law of England, as has frequently been observed, doth not acknowledge or pay any deference to the civil law considered as such ; but merely permits its use in such cases where it judged its determinations equitable, and therefore blends it, in the present instance, with other marine laws: the whole being corrected, altered, and amended by acts of parliament and common usage ; so that out of this composition a body of jurisprudence is extracted, which owes its authority only to its reception here by consent of the crown and people. The first process in these courts is frequently by arrest of the defendant's person ;

² The general jurisdiction of the present Court of Admiralty is stated in note 3, in the preceding chapter.

and they also take recognizances or stipulations of certain fidejussors in the nature of bail, and in case of default may imprison both them and their principal. They may also fine and imprison for a contempt in the face of the court. And all this is supported by immemorial usage, grounded on the necessity of supporting a jurisdiction so extensive; though opposite to the usual doctrines of the common law, these being no courts of record, because in general their process is much conformed to that of the civil law.

III. I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical or maritime tribunals, are for that very reason within the cognizance of the common law courts of justice. For it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress. The definition and explication of these numerous injuries, and their respective legal remedies, will employ our attention for many subsequent chapters. But before we conclude the present, I shall just mention two species of injuries, which will properly fall now within our immediate consideration: and which are, either when justice is delayed by an inferior court that has proper cognizance of the cause; or, when such inferior court takes upon itself to examine a cause and decide the merits without a legal authority.

I. The first of these injuries, refusal or neglect of justice, is remedied either by writ of *procedendo* or of *mandamus*. A writ of *procedendo ad judicium* issues out of the court of chancery, where judges of any subordinate court do delay the parties; for that they will not give judgment, either on the one side or the other, when they ought so to do. In this case a writ of *procedendo* shall be awarded, commanding them in the king's name to proceed to judgment; but without specifying any particular judgment, for that (if erroneous) may be set aside in the course of appeal, or by writ of error or false judgment: and upon farther neglect or refusal, the judges of the inferior court may be punished for their contempt, by writ of attachment returnable in the king's bench or common pleas.

A writ of *mandamus* is in general, a command issuing in the king's name from the court of king's bench, and directed to any

person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some *particular* thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes to be consonant to right and justice. It is a high prerogative writ, of a most extensively remedial nature ; and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution of an office ; but it issues in all cases where the party hath a right to have any thing done, and hath no other specific means of compelling its performance. A *mandamus* therefore lies to compel the admission or restoration of the party applying to any office or franchise of a public nature, whether spiritual or temporal ; to academical degrees ; to the use of a meeting-house, &c. : it lies for the production, inspection, or delivery of public books and papers ; for the surrender of the *regalia* of a corporation ; to oblige bodies corporate to affix their common seal ; to compel the holding of a court : and for an infinite number of other purposes, which it is impossible to recite minutely. But at present we are more particularly to remark, that it issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the court of king's bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers, with which the crown or legislature have invested them ; and this not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice. A *mandamus* may therefore be had to the courts of the city of London, to enter up judgment ; to the spiritual courts to grant an administration, to swear a church warden, and the like. This writ is grounded on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below ; whereupon, in order more fully to satisfy the court that there is a probable ground for such interposition, a rule is made (except in some general cases, where the probable ground is manifest) directing the party complained of to show cause why a writ of *mandamus* should not issue : and, if he shows no sufficient cause, the writ itself is issued, at first in the alternative, either to do thus, or signify some reason to the contrary ; to which a return, or answer, must be made at a certain day. And if the

inferior judge, or other person to whom the writ is directed, returns or signifies an insufficient reason, then there issues in the second place a *peremptory mandamus*, to do the thing absolutely; to which no other return will be admitted, but a certificate of perfect obedience and due execution of the writ. If the inferior judge or other person makes no return, or fails in his respect and obedience, he is punishable for his contempt by attachment. But if he, at the first, returns a sufficient cause, although it should be false in fact, the court of king's bench will not try the truth of the fact upon affidavits; but will for the present believe him, and proceed no farther on the *mandamus*. But then, the party injured may have an action against him for his false return, and (if found to be false by the jury) shall recover damages equivalent to the injury sustained; together with a *peremptory mandamus* to the defendant to do his duty. Thus much for the injury of neglect or refusal of justice.⁸

2. The other injury, which is that of encroachment of jurisdiction, or calling one *coram non judice*, to answer in a court that has no legal cognizance of the cause, is also a grievance, for which the common law has provided a remedy by the writ of *prohibition*.

⁸ In this country, the writ of *mandamus* is generally issued in each State by the highest court of original jurisdiction at law. In causes within the original jurisdiction of the federal courts, it is issued by the Supreme Court of the United States. It is a general rule that, to entitle a party to a *mandamus*, there must not only be a clear legal right, but the absence of a plain legal remedy. (*People v. Hawkins*, 46 N. Y. 9; 112 U. S. 177; 54 Conn. 274; 11 N. Y. 563.) It may, for instance, be issued to compel a court to restore an attorney who has been improperly removed (7 Wallace, 364; 1 Johns. Cas. 181); or to compel a judicial officer to perform some ministerial duty obligatory upon him, or to exercise his jurisdiction (131 U. S. 221); but it is not a permissible remedy to control the action of courts or judicial officers in the exercise of judicial discretion (114 U. S. 174; 104 N. Y. 96). So a *mandamus* may be issued to compel public officers to perform duties of a ministerial nature, as to require a county clerk to record a deed which has been duly acknowledged and certified (*Ex parte Goodell*, 14 Johns. 325); to compel a commissioner of jurors to strike from the list the name of a person not liable to jury duty (*People v. Taylor*, 45 Barb. 129); and in other similar cases. In like manner a corporation may be required by *mandamus* to do a specific act, obligatory upon it by law. (104 N. Y. 58; 51 Conn. 137; 48 N. J. L. 55.) The practice upon writs of *mandamus* has been somewhat changed, both in England and in this country, and issue is generally joined by pleading to the return, instead of bringing an action for a false return as formerly.

A prohibition is a writ issuing properly only out of the court of king's bench, being the king's prerogative writ; but, for the furtherance of justice, it may now also be had in some cases out of the court of chancery, common pleas, or exchequer; directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion, that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. And if either the judge or the party shall proceed after such prohibition, an attachment may be had against them, to punish them for the contempt, at the discretion of the court that awarded it; and an action will lie against them, to repair the party injured in damages.⁴

⁴ Writs of prohibition may be issued by the Supreme Court of the United States to the District Courts, when proceeding as courts of admiralty and maritime jurisdiction. In the respective States, they are generally issued by the supreme court, or the highest court of original jurisdiction at law. Such a writ may be issued to prevent the exercise by a judicial tribunal of jurisdiction over matters not within its cognizance, or to prevent it from exceeding its jurisdiction in matters which are within its cognizance. It does not lie to restrain a ministerial act, nor can it take the place of an appeal or writ of error. (*Quimbo Appo v. People*, 20 N. Y. 531; see 60 N. Y. 31; 116 U. S. 167.) For the practice upon writs of prohibition, the statutes of the several States should be consulted.

CHAPTER VI.

[BL. COMM.—BOOK III. CH. VIII.]

Of Wrongs, and their Remedies, Respecting the Rights of Persons.

THE former chapters of this part of our Commentaries having been employed in describing the several methods of redressing private wrongs, either by the mere act of the parties, or the mere operation of law; and in treating of the nature and several species of courts; together with the cognizance of wrongs or injuries by private or special tribunals, and the public ecclesiastical, and maritime jurisdictions of this kingdom; I come now to consider at large, and in a more particular manner, the respective remedies in the public and general courts of common law, for injuries or private wrongs of any denomination whatsoever, not ex-

clusively appropriated to any of the former tribunals. And herein I shall, first, define the several injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury : and shall, secondly, describe the method of pursuing and obtaining these remedies in the several courts.

First then, as to the several injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury. And, in treating of these, I shall at present confine myself to such wrongs as may be committed in the mutual intercourse between subject and subject ; which the king, as the fountain of justice, is officially bound to redress in the ordinary forms of law : reserving such injuries or encroachments as may occur between the crown and the subject, to be distinctly considered hereafter, as the remedy in such cases is generally of a peculiar and eccentric nature.

Now, since all wrongs may be considered as merely a privation of right, the plain natural remedy for every species of wrong is the being put in possession of that right, whereof the party injured is deprived. This may either be effected by a specific delivery or restoration of the subject-matter in dispute to the legal owner ; as when lands or personal chattels are unjustly withheld or invaded : or where that is not a possible, or at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages ; as in case of assault, breach of contract, &c. : to which damages the party injured has acquired an incomplete or inchoate right, the instant he receives the injury ; though such right be not fully ascertained till they are assessed by the intervention of the law. The instruments whereby this remedy is obtained (which are sometimes considered in the light of the remedy itself) are a diversity of suits and actions, which are defined by the Mirror to be “the lawful demand of one’s right :” or, as Bracton and Fleta express it, in the words of Justinian, *jus prosequendi in judicio quod alicui debetur*.

With us in England the several suits, or remedial instruments of justice, are from the subject of them distinguished into three kinds ; actions, *personal*, *real*, and *mixed*.¹

¹ Most real and mixed actions have been abolished in England and the United States. The action of chief importance coming within either of these classes, which now exists, is the mixed action of ejectment ; but the procedure in this form of action has been much changed in modern times.

Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof : and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon *torts* or wrongs : and they are the same which the civil law calls "*actiones in personam, quæ adversus cum intenduntur, qui ex contractu vel delicto obligatus est aliquid dare vel concedere.*" Of the former nature are all actions upon debt or promises ; of the latter all actions for trespasses, nuisances, assaults, defamatory words, and the like.

Real actions (or, as they are called in the Mirror, *feudal* actions), which concern real property only, are such whereby the plaintiff, here called the demandant, claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee-simple, fee-tail, or for term of life. By these actions formerly all disputes concerning real estates were decided ; but they are now pretty generally laid aside in practice, upon account of the great nicety required in their management ; and the inconvenient length of their process : a much more expeditious method of trying titles being since introduced, by other actions personal and mixed.

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained. As for instance an action of waste : which is brought by him who hath the inheritance, in remainder or reversion, against the tenant for life, who hath committed waste therein, to recover not only the land wasted, which would make it merely a *real* action ; but also treble damages in pursuance of the statute of Gloucester, which is a *personal* recompense ; and so both, being joined together, denominate it a *mixed* action.

Under these three heads may every species of remedy by suit or action in the courts of common law be comprised. But in order effectually to apply the remedy, it is first necessary to ascertain the complaint. I proceed therefore now to enumerate the several kinds, and to inquire into the respective nature of all private wrongs, or civil injuries, which may be offered to the rights of either a man's person or his property ; recounting at the same time the respective remedies, which are furnished by the law for every infraction of right. But I must first beg leave

to premise, that all civil injuries are of two kinds, the one *without force* or violence, as slander or breach of contract ; the other coupled *with force* and violence, as batteries or false imprisonment. Which latter species savor something of the criminal kind, being always attended with some violation of the peace ; for which in strictness of law a fine ought to be paid to the king, as well as a private satisfaction to the party injured. And this distinction of private wrongs, into injuries *with* and *without* force, we shall find to run through all the variety of which we are now to treat. In considering of which, I shall follow the same method that was pursued with regard to the distribution of rights : for as these are nothing else but an infringement or breach of those rights, which we have before laid down and explained, it will follow that this negative system, of *wrongs*, must correspond and tally with the former positive system, of *rights*. As therefore we divide all rights into those of *persons* and those of *things*, so we must make the same general distribution of injuries into such as affect the *rights of persons*, and such as affect the *rights of property*.

The rights of *persons*, we may remember, were distributed into *absolute* and *relative* : *absolute*, which were such as appertained and belonged to private men, considered merely as individuals, or single persons ; and *relative*, which were incident to them as members of society, and connected to each other by various ties and relations. And the absolute rights of each individual were defined to be the right of personal security, the right of personal liberty, and the right of private property, so that the wrongs or injuries affecting them must consequently be of a correspondent nature.

I. As to injuries which affect the *personal security* of individuals, they are either injuries against their lives, their limbs, their bodies, their health, or their reputations.

1. With regard to the first subdivision, or injuries affecting the life of man, they do not fall under our present contemplation ; being one of the most atrocious species of crimes, the subject of the next book of our Commentaries.²

² No civil action can be brought at common-law to recover damages for wrongfully causing the death of a human being. But in England and in many of the American States, statutes have been passed, providing that, when the death of a person is caused by any wrongful act, neglect, or default, which

2, 3. The two next species of injuries, affecting the limbs or bodies of individuals, I shall consider in one and the same view. And these may be committed, 1. By *threats* and menaces of bodily hurt, through fear of which a man's business is interrupted. A menace alone, without a consequent inconvenience, makes not the injury : but, to complete the wrong, there must be both of them together. The remedy for this is in pecuniary damages, to be recovered by action of *trespass vi et armis* ; this being an inchoate, though not an absolute violence. 2. By *assault* ; which is an attempt or offer to beat another, without touching him : as if one lifts up his cane, or his fist, in a threatening manner at another ; or strikes at him, but misses him ; this is an assault, *insultus*, which Finch describes to be "an unlawful setting upon one's person." ⁸ This also is an inchoate violence, would, if death had not ensued, have entitled the injured party to sue for damages, his executor or administrator may bring action and recover damages for the benefit of the relatives of the deceased. (See *The Harrisburg*, 119 U. S. 199 ; *Grosso v. Delaware, &c. R. Co.*, 50 N. J. L. 317 ; *Holland v. Lynn R. Co.*, 144 Mass. 425 ; *Tilley v. Hudson River R. Co.*, 29 N. Y. 252.)

⁸ An assault may be defined as an offer or attempt to inflict corporal injury upon another, accompanied by circumstances which indicate an intent coupled with a present ability, to do actual violence. (See *Hays v. People*, 1 Hill, 351.) Every part of this definition is important. (1) It is sufficient that there be an offer or attempt to do violence ; if the attempt be consummated by an actual beating or striking, etc., this is a battery. But mere words of abuse will not constitute an assault. (2) The circumstances must indicate an intent to do actual violence. If, therefore, the person making an offer or attempt of violence, uses expressions showing that he has no actual intent to do injury, there is no assault ; as, if one should menace another with his fist or a weapon, but say at the same time : "If you were not an old man, I would knock you down." (See *Tuberville v. Savage*, 1 Modern Rep. 3.) But, as the definition implies, it is not necessary, in order that the act may amount to an assault, that there should be an *actual* intent to do violence ; but it is sufficient if such an intent be "*indicated*," *i. e.*, if the circumstances be such as to lead the person threatened, to believe on reasonable grounds, that violence will actually be done. If, therefore, one points an unloaded pistol at another, with every appearance of an intention to shoot, and the other party believes it to be loaded, this will amount to an assault. But a distinction is sometimes drawn between civil actions and criminal prosecutions for assault and battery, and actual intent required to be proved in the latter case, while an indicated intent would be held sufficient in the former. (3) There must be a present ability indicated to do actual violence. For if the person threatening be so confined or impeded that he cannot inflict the injury which he menaces, there is no assault. (See 59 Vt. 316 ; 43 Mich. 521.)

In all cases of justifiable assaults which are mentioned in the text, the

amounting considerably higher than bare threats ; and therefore, though no actual suffering is proved, yet the party injured may have redress by action of *trespass vi et armis* ; wherein he shall recover damages as a compensation for the injury. 3. By *battery* ; which is the unlawful beating of another. The least touching of another's person wilfully, or in anger, is a battery ; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it ; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner. And therefore upon a similar principle the Cornelian law *de injuriis* prohibited *pulsation* as well as *verberation* ; distinguishing verberation, which was accompanied with pain, from pulsation, which was attended with none. But battery is, in some cases, justifiable or lawful ; as where one who hath authority, a parent, or master, gives moderate correction to his child, his scholar, or his apprentice. So also on the principle of self-defence : for if one strikes me first, or even only assaults me, I may strike in my own defence ; and, if sued for it, may plead *son assault demesne*, or that it was the plaintiff's own original assault that occasioned it. So likewise in defence of my goods or possession, if a man endeavors to deprive me of them, I may justify laying hands upon him to prevent him ; and in case he persists with violence, I may proceed to beat him away. Thus too in the exercise of an office, as that of churchwarden or beadle, a man may lay hands upon another to turn him out of church, and prevent his disturbing the congregation. And, if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, *molliter manus imposuit*, for this purpose. On account of these causes of justification, battery is defined to be the *unlawful* beating of another ; for which the remedy is, as for assault, by action of *trespass vi et armis* : wherein the jury will give adequate damages. 4. By *wounding* ; which consists in giving another some dangerous hurt, and is only an aggravated species of battery used must be no greater than is reasonable and necessary with reference to the exigency of the case ; for any excess of violence, the party may be made responsible. In the defense of the possession of a house or one's premises, an intruder, who entered peaceably, must first be requested to leave, and only in case of his refusal can force be used to compel him to depart. (See *Breitenbach v. Trowbridge*, 64 Mich. 393 ; *Kiff v. Youmans*, 86 N. Y. 324 ; *Brown v. Gordon*, 1 Gray, 182 ; *Scribner v. Beach*, 4 Denio, 448.)

tery. 5. By *mayhem* ; which is an injury still more atrocious, and consists in violently depriving another of the use of a member proper for his defence in fight. This is a battery, attended with this aggravating circumstance, that thereby the party injured is forever disabled from making so good a defence against future external injuries, as he otherwise might have done. Among these defensive members are reckoned not only arms and legs, but a finger, an eye, and a foretooth, and also some others. But the loss of one of the jaw-teeth, the ear, or the nose, is no mayhem at common law ; as they can be of no use in fighting. The same remedial action of *trespass vi et armis* lies also to recover damages for this injury, an injury which (when wilful) no motive can justify, but necessary self-preservation. If the ear be cut off, treble damages are given by statute 37 Hen. VIII., ch. 6, though this is not mayhem at common law. And here I must observe, that for these four last injuries, assault, battery, wounding, and mayhem, an indictment may be brought as well as an action ; and frequently both are accordingly prosecuted ; the one at the suit of the crown for the crime against the public ; the other at the suit of the party injured, to make him a reparation in damages.⁴

4. Injuries, affecting a man's *health*, are where, by any unwholesome practices of another, a man sustains any apparent damage in his vigor or constitution. As by selling him bad provisions, or wine ; by the exercise of a noisome trade, which infects the air in his neighborhood ; or by the neglect or unskilful management of his physician, surgeon, or apothecary.⁵ For it hath been solemnly resolved, that *mala praxis* is a great misdemeanor and offence at common law, whether it be for curiosity and experiment, or by neglect ; because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction. Thus also, in the civil law, neglect or want of skill in physicians or surgeons, "*culpæ adnumerantur, veluti si medi-*

⁴ The offense of mayhem has, in modern times, been extended in some States by statute, so as to include injuries to other parts of the person than members used for defense in fight. Thus, injuries to the nose, lip, ear, etc., causing disfigurement, have been constituted acts of mayhem. But such changes are wholly statutory. (See 50 N. Y. 598 ; 62 Cal. 542.)

⁵ See *Carpenter v. Blake*, 60 Barb. 485, 50 N. Y. 696 ; *McCandless v. McWha*, 22 Penn. St. 261 ; *Patten v. Wiggen*, 51 Me. 594.

cus curationem dereliquerit, male quempiam secuerit, aut perperam ei medicamentum dederit." These are wrongs or injuries unaccompanied by force, for which there is a remedy in damages by a special action of *trespass upon the case*. This action of *trespass*, or transgression, *on the case*, is a universal remedy, given for all personal wrongs and injuries without force ; so called because the plaintiff's whole case or cause of complaint is set forth at length in the original writ. For though in general there are methods prescribed, and forms of actions previously settled, for redressing those wrongs, which most usually occur, and in which the very act itself is immediately prejudicial or injurious to the plaintiff's person or property, as battery, non-payment of debts, detaining one's goods, or the like ; yet where any special consequential damage arises, which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed, both by common law and the statute of Westm. 2, ch. 24, to bring a special action on his own case, by a writ formed according to the peculiar circumstances of his own particular grievance. For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action ; and therefore, wherever a new injury is done, a new method of remedy must be pursued. And it is a settled distinction, that where an act is done which is in itself an *immediate* injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis* ; but where there is no act done, but only a culpable omission ; or where the act is not immediately injurious, but only by *consequence* and collaterally ; there no action of trespass *vi et armis* will lie, but an action on the special case, for the damages consequent on such omission or act.

5. Lastly ; injuries affecting a man's *reputation* or good name are, first, by malicious, scandalous, and slanderous *words*, tending to his damage and derogation.⁶ As if a man maliciously and

⁶ Slander is defamatory accusation addressed to the ear, and is thus distinguished from libel, which is defamatory matter addressed to the eye ; as by writing, pictures, or signs. Slander is a civil injury only, and the sole mode of redress is by a civil action for damages ; but libel is besides a criminal offense, and a criminal prosecution may be instituted therefor, as well as a civil action. The various forms of slander are divided into four classes : (1.) Charge of an indictable offense, involving moral turpitude. Thus, to accuse a man of any *felonious* crime, such as murder, robbery, burglary, rape, etc., would be actionable. But the charge of having committed a *misdemeanor*

falsely utter any slander or false tale of another; which may either endanger him in law, by impeaching him of some heinous crime, as to say that a man hath poisoned another, or is perjured; only, would not be slanderous, under the prevailing American rule, unless the offense involved moral turpitude. Thus, the charge of removing a landmark (this being a misdemeanor) has been held to be actionable as a slander. (3 Hill, 21; see 91 U. S. 225; 53 Wis. 444.) But a charge of having committed assault and battery would not be of itself slanderous, for, though this is a crime, yet it is not deemed obnoxious on moral grounds. An imputation of an act involving moral turpitude, but not constituting a crime, would not be slanderous, for both these elements must be involved in the charge; thus, a charge of adultery would not be slanderous at common law, since it is not a crime. (*Buys v. Gillespie*, 2 Johns. 115; *Brooker v. Coffin*, 5 Johns. 188.) But if in any State, adultery were declared to be an indictable offense (which has been done in some States,) an imputation of having committed it would be actionable. (131 Mass. 433.) In England a charge of any crime is slander *per se*.

(2.) An imputation of having certain infectious diseases tending to exclude one from society; as of having leprosy or a venereal disorder. (*Hewit v. Mason*, 24 How. Pr. 366.) But a charge of *having had* such a disease is not actionable. (A leading case on slander is *Pollard v. Lyon*, 91 U. S. 225.)

(3.) Charges tending to injure a person in his trade, employment, or profession; as a charge of official misconduct against a public officer (*Kinney v. Nash*, 3 N. Y. 177); of fraudulent practices against a business man (*Backus v. Richardson*, 5 Johns. 476); of insolvency against a merchant or trader (*Carpenier v. Dennis*, 3 Sandf. 305); of unskilfulness or incompetence against an artisan or mechanic or any person whose employment requires peculiar skill and knowledge (*Fitzgerald v. Redfield*, 51 Barb. 484); of general incapacity against a professional man, as a physician or lawyer (*Lynde v. Johnson*, 39 Hun, 12; *De Pew v. Robinson*, 95 Ind. 109). But it is a general rule, in all such cases, that the imputation must relate *directly* to the business or professional character of the person defamed, and that he must be at the time engaged in his occupation or profession. (*Ireland v. McGarvish*, 1 Sandf. 155; *Forward v. Adams*, 7 Wend. 204.) It would not, therefore, be actionable to charge a physician with being an incompetent lawyer, or *vice versa*.

(4.) Any defamatory imputation, resulting in special damage of a pecuniary nature to the person defamed; as if a woman be falsely charged with adultery or unchastity, and lose a profitable situation in consequence; or, if a man be charged with being a swindler, or with dishonesty, and this occasions his discharge from some position of profit. The damage must be pecuniary, but need not be specifically a loss of money; a loss of anything whose value is estimable pecuniarily will be sufficient, as a loss of means of support, or of a promised marriage. (*Moody v. Baker*, 5 Cow. 351.) But the resulting damage must be a proximate consequence of the defamatory charge, and not a remote result. (*Terwilliger v. Wands*, 17 N. Y. 54; see 11 Q. B. D. 407.)

The three first classes of slander are termed cases of slander *per se*, (*i.e.*, of itself, since no proof of a special damage is required), to distinguish them from the fourth class, in which special damage must be proved. If any defam-

or which may exclude him from society, as to charge him with having an infectious disease ; or which may impair or hurt his trade or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave. Words spoken in derogation of a peer, a judge, or other great officer of the realm, which are called *scandalum magnatum*, are held to be still more heinous : and though they be such as would not be actionable in the case of a common person, yet when spoken in disgrace of such high and respectable characters, they amount to an atrocious injury ; which is redressed by an action on the case founded on many ancient statutes ; as well on behalf of the crown, to inflict the punishment of imprisonment on the slanderer, as on behalf of the party, to recover damages for the injury sustained. Words also tending to scandalize a magistrate, or person in a public trust, are reputed more highly injurious than when spoken of a private man. It is said, that formerly no actions were brought for words, unless the slander was such as (if true) would endanger the life of the object of it. But too great encouragement being given by this lenity to false and malicious slanderers, it is now held that for scandalous words of the several species before-mentioned, (that may endanger a man by subjecting him to the penalties of the law, may exclude him from society, may impair his trade, or may affect a peer of the realm, a magistrate or one in public trust), an action on the case may be had, without proving any atory accusations, not coming within the first three classes, are made, and no special damage results, no action can be maintained ; as, *e. g.*, a charge of unchastity against a woman. But, in some States, the rules of the common law have been somewhat changed by statute. Thus, in New York, it is provided that a woman may maintain an action for a false charge of unchastity, without proof of special damage. (Laws of 1871, ch. 219.) It is not necessary, in order to constitute a slander, that the imputation should be made in a direct form ; it may be made by indirect insinuation, or in the form of an interrogation, or as obtained by report from others. (*Rundell v. Butler*, 7 Barb. 260 ; *Johnson v. Brown*, 57 Barb. 118.) It will in all cases be a sufficient defense that the accusation is true ; and if, although false, the imputation be made under circumstances of privilege, it will be excused, and no responsibility will be incurred. As to the nature of "privileged communications," see the next note.

In order to maintain an action for *slander of title*, the words must not only be false and malicious, but must be followed, as a natural and direct consequence, by pecuniary damage to the owner of the property (*Kendall v. Stone*, 5 N. Y. 14 ; *Like v. McKinstry*, 4 Keyes, 397.)

The action for *scandalum magnatum*, is now obsolete.

particular damage to have happened, but merely upon the probability that it might happen. But with regard to words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened; which is called laying his action with a *per quod*. As if I say that such a clergyman is a bastard, he cannot for this bring any action against me, unless he can show some special loss by it; in which case he may bring his action against me, for saying he was a bastard, *per quod*, he lost the presentation to such a living. In like manner to *slander another man's title*, by spreading such injurious reports, as, if true, would deprive him of his estate, (as to call the issue in tail, or one who hath land by descent, a bastard), is actionable, provided any special damage accrues to the proprietor thereby; as if he loses an opportunity of selling the land. But mere scurrility, or opprobrious words, which neither in themselves import, nor are in fact attended with, any injurious effects, will not support an action. So scandals, which concern matters merely spiritual, as to call a man heretic or adulterer, are cognizable only in the ecclesiastical court; unless any temporal damage ensues, which may be a foundation for a *per quod*. Words of heat and passion, as to call a man a rogue and rascal, if productive of no ill consequence, and not of any of the dangerous species before-mentioned, are not actionable: neither are words spoken in a friendly manner, as by way of advice, admonition, or concern, without any tincture or circumstance of ill-will: for, in both these cases, they are not *maliciously* spoken, which is part of the definition of slander. Neither (as was formerly hinted) are any reflecting words made use of in legal proceedings, and pertinent to the cause in hand, a sufficient cause of action for slander. Also if the defendant be able to justify, and prove the words to be true, no action will lie, even though special damage hath ensued: for then it is no slander or false tale. As if I can prove the tradesman a bankrupt, the physician a quack, the lawyer a knave, and the divine a heretic, this will destroy their respective actions: for though there may be damage sufficient accruing from it, yet, if the fact be true, it is *damnum absque injuria*; and where there is no injury, the law gives no remedy. And this is agreeable to the reasoning of the civil law: "*eum qui nocentem infamat, non est æquum et bonum*

ob eam rem condemnari ; delicta enim nocentium nota esse oportet et expedit."

A second way of affecting a man's reputation is by printed or written libels, pictures, signs, and the like ; which set him in an odious or ridiculous light, and thereby diminish his reputation.⁷ With regard to libels in general, there are, as in many

⁷ Libel, considered as the basis of a civil action, may be defined as a malicious publication in printing, writing, signs, or pictures, imputing to another something which has a tendency to injure his reputation, to disgrace or degrade him in society, or to hold him up to hatred, contempt, or ridicule. This offense is more comprehensive in its scope than slander ; since many forms of defamation, which, if made orally, would not be actionable without proof of special damage, are actionable as libels, when circulated in a written or printed form, without such proof. The ground upon which this distinction rests is that imputations against character, when reduced to writing or printed, are capable of wider dissemination, and longer perpetuation, than when made merely by word of mouth, and therefore work more lasting and injurious results. Hence, charges of certain kinds may be made orally with impunity, which would become actionable if published in writing, either by the author or some person to whom they had been communicated. In all cases in which a civil action may be maintained for libel, a criminal prosecution may also be instituted ; and these remedies are not mutually exclusive, but cumulative. But the theory upon which the criminal doctrine of libel is founded, is different from that upon which the civil doctrine depends. Libel is deemed a crime, because it tends to cause a breach of the peace, and thus result in public detriment. In former times, it was judged probable that the person defamed would be provoked to assault the libeller, or challenge him to combat, and, upon this ground, was originally based the jurisdiction of criminal courts over this offence. But libel is considered the basis of a civil action, not by reason of presumable injury to public welfare, but because it is a violation of the personal right of reputation. This distinction leads to important results. Thus, it is a rule, in the law of libel and slander, that there must be a "*publication*" of the defamatory charge—*i. e.*, it must be made known or communicated to some other person or persons than himself by the defamer. In the criminal law, it is deemed a sufficient publication, if the charge is communicated merely to the person libelled, since he might be incensed to commit a breach of the peace, whether others knew of the charge or not. But there could be no civil action maintained, unless the charge were made known to third persons ; since the plaintiff only sues because his reputation has been injured, and reputation is the estimate placed upon a person's character by others than himself. Moreover, proof of the truth of the accusation is always a sufficient defense to a civil action for libel, since a person has no right to a better reputation than his real character would justify ; but at common law, the doctrine that the truth is a sufficient defense to a criminal prosecution was so far from being maintained, that it became an established maxim,—“the greater the truth, the greater the libel.” This was upon

other cases, two remedies ; one by indictment, and the other by action. The former for the *public* offence ; for every libel has a

the ground that a man might be more provoked to retaliation by the publication of a truthful assertion than if it were false ; for, in the latter case, he might overlook it as powerless to do injury, or regard it with contempt. But, in modern times, it is generally provided by statute that the truth shall be a good defense to a criminal prosecution, if the charge be proved to have been published *with good motives, and for justifiable ends*. But there is evidently still an important difference between the civil and criminal law in this respect. A plea of the truth as a defense is known technically as a "justification." (See 9 Metc. 410 ; 53 Conn. 43 ; 44 Hun, 608.)

No classification can be given of the various forms of libel, as in the law of slander ; and the modes of defamation are so diversified that no comprehensive enumeration can be given of them. It will be sufficient to refer to a few cases by way of example ; such are charges of fraudulent or dishonest practices ; of criminal acts ; of incontinence or unchastity ; of corruption in office ; of incompetence in one's profession or occupation, etc. (See *Steele v. Southwick*, 9 Johns. 214 ; *Fry v. Bennett*, 28 N. Y. 324 ; *Hunt v. Bennett*, 19 N. Y. 173 ; 136 Mass. 164 ; 60 Md. 158 ; 81 N. Y. 116 ; 7 Johns. 264 ; 46 Mich. 341 ; 88 Ind. 137.) An ironical or indirect mode of communicating a libellous charge will be actionable, in the same way as if it had been made directly.

It is a necessary ingredient, in both libel and slander, that the defamation be *malicious*. A distinction is made between malice in fact and malice in law. The former denotes actual ill-will or malevolence, or other actual wrongful motive ; the latter, that disposition of mind from which proceed wrongful acts done without just cause or excuse. In ordinary cases of libel, where there are no circumstances of privilege which are claimed to render the charge excusable, malice is conclusively inferred from the falsity and defamatory nature of the charge, and need not be specially proved. This is malice in law, and the presumption of its existence is so absolute that the defendant is not permitted to deny it. But when there are circumstances of privilege, actual malice must be proved to exist, or the plaintiff cannot maintain his action.

Privileged Communications.—These are communications which, though defamatory and unfounded, are yet held to be excusable, because made in the performance of some legal, social or moral duty, for the protection of valuable interests, or for like salutary causes. They are divided into two important classes ;—those which are *absolutely* privileged, and those which are *conditionally* privileged. The former can never be made the basis of an action, though characterized by the most express malice ; while the latter will be actionable, if actual malice be proved to have existed. It is essential to exoneration, in this class of cases, that the charge be made in good faith, with belief in its truth. There are two classes of communications which are absolutely privileged : (1) Proceedings in legislative assemblies in the transaction of public business, as reports upon any subject, speeches, etc. (2) Proceedings in judicial tribunals, which are pertinent to any cause of which

tendency to the breach of the peace, by provoking the person libelled to break it: which offence is the same (in point of law) whether the matter contained be true or false; and therefore the defendant, on an indictment for publishing a libel, is not allowed to allege the truth of it by way of justification. But in the remedy by action on the case, which is to repair the *party* in damages for the injury done him, the defendant may, as for words *spoken*, justify the truth of the facts, and show that the plaintiff has received no injury at all. What was said with regard to words spoken, will also hold in every particular with regard to libels by writing or printing, and the civil actions consequent thereupon: but as to signs or pictures, it seems necessary always to show, by proper *innuendos* and averments of the defendant's meaning, the import and application of the scandal, and that some special damage has followed; otherwise it cannot appear, that such libel by picture was understood to be levelled at the plaintiff, or that it was attended with any actionable consequences.

A third way of destroying or injuring a man's reputation is by preferring malicious indictments or prosecutions against him; which, under the mask of justice and public spirit, are sometimes made the engines of private spite and enmity. For this, however, the law has given a very adequate remedy in damages, either by an action of *conspiracy*, which cannot be brought but against two at the least;† or, which is the more usual way, by a special action on the case for a false and malicious prosecution. In order to carry on the former (which gives a recompense for the danger to which the party has been exposed) it is necessary that the plaintiff should obtain a copy of the record of his in the court has jurisdiction. (See 50 N. Y. 309; 69 Md. 143 & 179; 69 Cal. 625; 75 Ind. 55; 11 Q. B. D. 588.) As illustrations of conditionally privileged communications, the following instances may be referred to: Petitions to the legislature or proper public officers to secure public reforms; communications made by a public officer in the discharge of a public duty; statements in regard to the character of servants made to those who intend to employ them; communications between partners or persons connected in business for the protection of their private interests; fair criticisms upon published works, etc. (*Byam v. Collins*, 111 N. Y. 143; *White v. Nicholls*, 3 How. (U. S.) 266; see 16 Q. B. D. 112; 23 id. 400; 50 N. J. L. 275; 111 Pa. St. 404; 64 Md. 589.) The doctrine of privileged communications applies to the law of slander as well as to that of libel.

† As a general rule, a civil action may be brought for a conspiracy to do any injury, followed by acts in furtherance thereof and consequent damage (113 U. S. 104; 111 Pa. St. 335; 65 N. Y. 89); a verdict against only one defendant is sometimes sustainable. (7 Hill, 104; 125 Pa. St. 123.)

dictment and acquittal ; but, in prosecutions for felony, it is usual to deny a copy of the indictment, where there is any, the least, probable cause to found such prosecution upon. For it would be a very great discouragement to the public justice of the kingdom, if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried. But an action on the case for a malicious prosecution may be founded upon an indictment, whereon no acquittal can be had ; as if it be rejected by the grand jury, or be *coram non judice*, or be insufficiently drawn. For it is not the danger of the plaintiff, but the scandal, vexation, and expense, upon which this action is founded. However, any probable cause for preferring it is sufficient to justify the defendant.⁸

II. We are next to consider the violation of the right of personal liberty. This is effected by the injury of false imprisonment, for which the law has not only decreed a punishment, as a heinous public crime, but has also given a private reparation to

⁸ In order to sustain an action for malicious prosecution, it is necessary to allege and prove,—(1) that the defendant instituted the criminal prosecution or civil action, which is complained of as unjustifiable ; (2) that this was done through malice, (3) and without probable cause ; and (4) that such prosecution has terminated in favor of the now plaintiff, if from its nature it was capable of such a termination. The gist of the proof is, to establish want of probable cause to justify the previous prosecution. Probable cause is defined as a reasonable suspicion, supported by circumstances sufficient to warrant a cautious man in the belief that the person accused is guilty of the offense charged. (*Foshay v. Ferguson*, 2 Denio, 617.) It does not depend upon the guilt or innocence of the accused, but upon the reasonable belief of the prosecutor concerning such guilt or innocence. If, therefore, the person accused were really innocent, but the prosecutor believed him guilty, and had reasonable grounds for his belief, this will be a complete defense to a subsequent action for malicious prosecution. The malice required to be proved is malice in fact, *i. e.*, a direct malevolent purpose or other actual wrongful motive ; but whether such motive existed is for the jury to decide ; they may (*may*, not *must*) infer it from the absence of probable cause. But although the most express malice be proved to exist, the want of probable cause cannot be inferred therefrom ; for a man may have a just ground of action, and be justified in prosecuting it at law, though he act from positive malevolence. The termination of the prosecution must be proved, because, if not terminated, it may result in a conviction of the person accused ; and a conviction would be conclusive evidence that probable cause did exist, so that no suit for such prosecution would be maintainable. (See *Marks v. Townsend*, 97 N. Y. 590 ; *Anderson v. How*, 116 N. Y. 336 ; *Abrath v. N. E. R. Co.*, 11 Q. B. D. 440, 11 App. Cas. 247 ; *Crescent Co. v. Butchers' Union*, 120 U. S., 141 ; also 109 Mass. 158 ; 56 Mich. 366 ; 66 Me. 202.)

the party ; as well by removing the actual confinement for the present, as, after it is over, by subjecting the wrongdoer to a civil action, on account of the damage sustained by the loss of time and liberty.

To constitute the injury of false imprisonment there are two points requisite : 1. The detention of the person : and, 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets.⁹ Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority : which authority may arise either from some process from the courts of justice, or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment ; or from some other special cause warranted, for the necessity of the thing, either by common law, or act of parliament ; such as the arresting of a felon by a private person without warrant, the impressing of mariners for the public service, or the apprehending of wagoners for misbehavior in the public highways. False imprisonment also may arise by executing a lawful warrant or process at an unlawful time, as on a Sunday ; for the statute hath declared, that such service or process shall be void. This is the injury. Let us next see the remedy : which is of two sorts ; the one *removing* the injury, the other *making satisfaction* for it.

The principal means of *removing* the actual injury of false imprisonment is by writ of *habeas corpus*.

Of this there are various kinds made use of by the courts at Westminster, for removing prisoners from one court into another for the more easy administration of justice. Such is the *habeas*

⁹ A manual touching of the body is not necessary to constitute an arrest and imprisonment ; it is sufficient if a person, on being informed that an officer has a warrant for him, submits to such officer's control, or, being influenced by demonstrations of violence, submits to restraint upon his liberty. (*Bissell v. Gold*, 1 Wend. 210.) If a person be arrested and detained without legal cause,—or without legal process, when, although there be legal cause, legal process is necessary,—or upon invalid process,—or upon an unlawful occasion,—this will constitute false imprisonment, and an action will be maintainable to recover damages. (*Kilbourn v. Thompson*, 103 U. S. 168 ; *Lynch v. Metr. R. Co.*, 90 N. Y. 77 ; *Burns v. Erben*, 40 N. Y. 463 ; *Ross v. Leggett*, 61 Mich. 445 ; *Bath v. Metcalf*, 145 Mass. 274.)

corpus ad respondendum, when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with this new action in the court above. Such is that *ad satisfaciendum*, when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution. Such also are those *ad prosequendum*, *testificandum*, *deliberandum*, &c.; which issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed. Such is, lastly, the common writ *ad faciendum et recipiendum*, which issues out of any of the courts of Westminster-hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer (whence the writ is frequently denominated a *habeas corpus cum causâ*) to do and receive whatsoever the king's court shall consider in that behalf. This is a writ grantable of common right, without any motion in court, and it instantly supersedes all proceedings in the court below.

But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*; directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf. This is a high prerogative writ, and therefore by the common law issuing out of the court of king's bench not only in term-time, but also during the vacation, by a *fiat* from the chief justice or any other of the judges, and running into all parts of the king's dominions; for the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon; unless the term shall intervene, and then it may be returned in court. Indeed if the party were privileged in the courts of common pleas and exchequer, as being (or supposed to be) an officer or suitor of the court, a *habeas corpus ad subjicien-*

dum might also by common law have been awarded from thence ; and, if the cause of imprisonment were palpably illegal, they might have discharged him : but, if he were committed for any criminal matter, they could only have remanded him, or taken bail for his appearance in the court of king's bench, which occasioned the common pleas for some time to discountenance such applications. But since the mention of the king's bench and common pleas, as co-ordinate in this jurisdiction, by statute 16 Car. I., ch. 10, it hath been holden, that every subject of the kingdom is equally entitled to the benefit of the common law writ, in either of those courts, at his option. It hath also been said, and by very respectable authorities, that the like *habeas corpus* may issue out of the court of chancery in vacation ; but upon the famous application to Lord Nottingham by Jenks, notwithstanding the most diligent searches, no precedent could be found where the chancellor had issued such a writ in vacation, and therefore his lordship refused it.¹⁰

In the king's bench and common pleas it is necessary to apply for it by motion to the court, as in the case of all other prerogative writs (*certiorari*, prohibition, *mandamus*, etc.) which do not issue as of mere course, without showing some probable cause why the extraordinary power of the crown is called in to the party's assistance. For, as was argued by Lord Chief Justice Vaughan, "it is granted on motion, because it cannot be had of course ; and there is therefore no *necessity* to grant it : for the court ought to be satisfied that the party hath a probable cause to be delivered." And this seems the more reasonable, because (when once granted) the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner. So that if it issued of mere course, without showing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the king's service, a wife, a child, a relation, or a domestic, confined for insanity, or other prudential reasons, might obtain a temporary enlargement by suing out a *habeas corpus*, though sure to be remanded as soon as brought up to the

¹ [But it was determined, after a very elaborate investigation of all the authorities by Lord Eldon in *Crowley's Case*, that the Lord Chancellor can issue the writ of *habeas corpus* at common law in vacation, overruling the decision in *Jenks's Case*. (See 2 Swanston, 1.)]

court. And therefore Sir Edward Coke, when chief justice, did not scruple in 13 Jac. I., to deny a *habeas corpus* to one confined by the court of admiralty for piracy; there appearing, upon his own showing, sufficient grounds to confine him. On the other hand, if a probable ground be shown, that the party is imprisoned without just cause, and therefore hath a right to be delivered, the writ of *habeas corpus* is then a writ of right, which "may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council or any other."

In a former part of these Commentaries we expatiated at large on the personal liberty of the subject. This was shown to be a natural inherent right, which could not be surrendered or forfeited unless by the commission of some great and atrocious crime, and which ought not to be abridged in any case without the special permission of law. A doctrine coeval with the first rudiments of the English Constitution, and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman conquest: asserted afterwards and confirmed by the Conqueror himself and his descendants; and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of *magna charta*, and a long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible: but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful. This it is, which induces the absolute necessity of expressing upon every commitment the reason for which it is made: that the court upon a *habeas corpus* may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

And yet, early in the reign of Charles I., the court of king's bench, relying on some arbitrary precedents (and those perhaps misunderstood) determined that they could not upon a *habeas corpus* either bail or deliver a prisoner, though committed with

out any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council. This drew on a parliamentary inquiry, and produced the *petition of right*, 3 Car. I., which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable. And when at length they agreed that it was, they however annexed a condition of finding sureties for the good behavior, which still protracted their imprisonment, the chief justice, Sir Nicholas Hyde, at the same time declaring, that "if they were again remanded for that cause, perhaps the court would not afterwards grant a *habeas corpus*, being already made acquainted with the cause of the imprisonment." But this was heard with indignation and astonishment by every lawyer present, according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four-and-twenty years.

These pitiful evasions gave rise to the statute 16 Car. I., ch. 10, § 8, whereby it is enacted, that if any person be committed by the king himself in person, or by his privy council, or by any of the members thereof, he shall have granted unto him, without any delay upon any pretence whatsoever, a writ of *habeas corpus*, upon demand or motion made to the court of king's bench or common pleas; who shall thereupon, within three court days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering, hailing, or remanding such prisoner. Yet still in the case of Jenks, before alluded to, who in 1676 was committed by the king in council for a turbulent speech at Guildhall, new shifts and devices were made use of to prevent his enlargement by law, the chief justice (as well as the chancellor) declining to award a writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to award the usual writs *ad deliberandum*, &c., whereby the prisoner was discharged at the Old Bailey. Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional

remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party : and many other vexatious shifts were practiced to detain state-prisoners in custody. But whoever will attentively consider the English history, may observe, that the flagrant abuse of any power, by the crown or its ministers, has always been productive of a struggle ; which either discovers the exercise of that power to be contrary to law, or (if legal) restrains it for the future. This was the case in the present instance. The oppression of an obscure individual gave birth to the famous *habeas corpus* act, 31 Car. II., ch. 2, which is frequently considered as another *magna charta* of the kingdom : and by consequence and analogy has also in subsequent times reduced the general method of proceeding on these writs (though not within the reach of that statute, but issuing merely at the common law) to the true standard of law and liberty.

The statute itself enacts, 1. That on complaint and request in writing by or on behalf of any person committed and charged with any *crime* (unless committed for treason or felony expressed in the warrant ; or as accessory, or on suspicion of being accessory, before the fact, to any petit-treason or felony ; or upon suspicion of such petit-treason or felony, plainly expressed in the warrant ; or unless he is convicted or charged in execution by legal process) the lord chancellor or any of the twelve judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges ; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. 2. That such writs shall be indorsed, as granted in pursuance of this act, and signed by the person awarding them. 3. That the writ shall be returned and the prisoner brought up, within a limited time according to the distance, not exceeding in any case twenty days. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without

sufficient reason or authority (specified in the act), shall for the first offence forfeit 100*l.* and for the second offence 200*l.* to the party grieved, and be disabled to hold his office. 5. That no person once delivered by *habeas corpus*, shall be recommitted for the same offence, on penalty of 500*l.* 6. That every person committed for treason or felony shall, if he requires it the first week of the next term, or the first day of the next session of *oyer and terminer*, be indicted in that term or session, or else admitted to bail : unless the king's witnesses cannot be produced at that time : and if acquitted, or if not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence ; but that no person, after the assizes shall be open for the county in which he is detained, shall be removed by *habeas corpus*, till after the assizes are ended ; but shall be left to the justice of the judges of assize. 7. That any such prisoner may move for and obtain his *habeas corpus*, as well out of the chancery or exchequer, as out of the king's bench or common pleas ; and the lord chancellor or judges denying the same, on sight of the warrant or oath that the same is refused, forfeit severally to the party grieved the sum of 500*l.* 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting, or convicts praying to be transported ; or having committed some capital offence in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions ; on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved a sum not less than 500*l.* to be recovered with treble costs ; shall be disabled to bear any office of trust or profit ; shall incur the penalties of *præmunire* ; and shall be incapable of the king's pardon.

This is the substance of that great and important statute : which extends (we may observe) only to the case of commitments for such criminal charge, as can produce no inconvenience to public justice by a temporary enlargement of the prisoner : all other cases of unjust imprisonment being left to the *habeas corpus* at common law.¹¹ But even upon writs at the common law

¹¹ By statute 56 Geo. III., ch. 100, provision was made for the issue of a writ of *habeas corpus*, in case a person is confined "otherwise than for some

it is now expected by the court, agreeable to ancient precedents and the spirit of the act of parliament, that the writ should be immediately obeyed, without waiting for any *alias* or *pluries*; otherwise an attachment will issue. By which admirable regulations, judicial as well as parliamentary, the remedy is now complete for removing the injury of unjust and illegal confinement. A remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention of government.¹² For it frequently happens in foreign countries (and has happened in England during temporary suspensions of the statute), that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.¹⁸

criminal, or supposed criminal, matter," except he be imprisoned for debt or by process in any civil suit. Power to issue the writ was also conferred upon the Court of Exchequer.

¹² "Besides the efficacy of the writ of *habeas corpus*, in liberating the subject from illegal confinement in a public prison, it also extends its influence to remove every unjust restraint of personal freedom in private life, though imposed by a husband on his wife, or by a father on his child; but when a feme-covert or an infant is brought before the court by *habeas corpus*, the court will only set such person free from an unmerited or unreasonable confinement, and will not determine the validity of a marriage, or the right to guardianship of an infant. Though, if a child is too young to have any discretion of its own, the court will deliver it into the custody of its parent, or of the person who appears to be its legal guardian." (Broom & Hadley's Comm. iii., 147. See also *People v. Mercein*, 8 Paige, 47; *Ex parte Wolstonecraft*, 4 Johns. Ch. 80.)

¹⁸ Statutes, similar in their general provisions to the English *Habeas Corpus* Act, have been enacted in the several American States. They are not confined in their application merely to imprisonment upon criminal charges, but extend generally to all cases of illegal restraint upon personal liberty. The mode of procedure in the issue of the writ is usually regulated by statutory provisions. The usual practice is, that application is made for the writ by petition signed by the person under confinement, or by some one in his behalf. This is addressed to the proper court, or a judge thereof, and if the writ be legally applied for, it must be granted, or the judge will incur a penalty for his refusal. The writ is directed to the person having the prisoner in custody, and is made returnable at a specified time and place. The person to whom it is directed is required to state in his "return" the grounds of the detention, and also to bring the prisoner in his custody before the court or officer when the return is made. The prisoner may then "traverse the return"—*i. e.*, deny any of the material facts set forth therein; or allege any fact to show that his imprisonment or detention is unlawful, or that he is entitled to his discharge. The question as to the rightfulness of the de

The *satisfactory* remedy for this injury of false imprisonment is by an action of trespass *vi et armis*, usually called an action of false imprisonment : which is generally, and almost unavoidably, accompanied with a charge of assault and battery also : and therein the party shall recover damages for the injury he has received ; and also the defendant is, as for all other injuries committed with force, or *vi et armis*, liable to pay a fine to the king for the violation of the public peace.

III. With regard to the third absolute right of individuals, or that of private property, though the enjoyment of it when acquired, is strictly a personal right ; yet as its nature and original and the means of its acquisition or loss, fall more directly under our second general division, of the *rights of things* ; and as of course, the wrongs that affect these rights must be referred to the corresponding division in the present book of our Commentaries ; I conceive it will be more commodious and easy to consider together, rather than in a separate view, the injuries that may be offered to the *enjoyment*, as well as to the *rights*, of property. And therefore I shall here conclude the head of injuries affecting the *absolute* rights of individuals.

We are next to contemplate those which affect their *relative* rights ; or such as are incident to persons considered as members of society, and connected to each other by various ties and relation is thus presented to the court for its determination ; and the jurisdiction of the court extends to discharging or remanding the prisoner, or admitting him to bail, as the case may seem to require. In cases of detention upon legal process, the court will not inquire into the merits of the case, and attempt to determine the guilt or innocence of the prisoner, but will only decide whether his commitment was regular, and in due accordance with law. (*People v. McLeod*, 25 Wend. 483 ; *People v. Kelly*, 24 N. Y. 74 ; *Bennac v. People*, 4 Barb. 31.) But the jurisdiction of the court, by which the prisoner was committed, may be inquired into, and if it be satisfactorily established that it had no jurisdiction, he will be discharged. The same is true, if the court has general jurisdiction of similar cases, but it has exceeded such jurisdiction in the confinement of the person applying for the writ. (*Ex parte Lange*, 18 Wallace, 163 ; see 60 N. Y. 559 ; 123 U. S. 443 ; 131 U. S. 176.)

The courts and judges of the United States have authority to issue the writ of *habeas corpus* in cases coming within the Federal jurisdiction. The State courts have no right to discharge a person upon *habeas corpus* who is held under the authority of the general government. (*Tarble's case*, 13 Wallace, 397.) Nor has a United States court power to issue its writ to bring up a prisoner confined under sentence or execution of a State court, for any other purpose than to use him as a witness.

tions; and, in particular, such injuries as may be done to persons under the four following relations, husband and wife, parent and child, guardian and ward, master and servant.

I. Injuries that may be offered to a person, considered as a *husband*, are principally three: *abduction*, or taking away a man's wife; *adultery*, or criminal conversation with her; and *beating* or otherwise abusing her. 1. As to the first sort, *abduction*, or taking her away, this may either be by fraud and persuasion, or open violence: though the law in both cases supposes force and constraint, the wife having no power to consent; and therefore gives a remedy by writ of *ravishment*, or action of *trespass vi et armis, de uxore rapta et abducta*. This action lay at the common law; and thereby the husband shall recover, not the possession of his wife, but damages for taking her away: and by statute Westm. 1, 3 Edw. I., ch. 13, the offender shall also be imprisoned two years, and be fined at the pleasure of the king. Both the king and the husband may therefore have this action; and the husband is also entitled to recover damages in an action on the case against such as persuade and entice the wife to live separate from him without a sufficient cause.¹⁴ The old law was so strict in this point, that if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted and in danger of being lost or drowned: but a stranger might carry her behind him on horseback to market to a justice of the peace for a warrant against her husband, or to the spiritual court to sue for a divorce. 2. *Adultery*, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the co-ercion of the spiritual courts; yet, considered as a civil

¹⁴ An action will lie by a husband for enticing away his wife, on the ground of loss of her society and services; and also for harboring her, after she has deserted him without cause, provided he has given notice to the person receiving her not to harbor her, or such person knew that the desertion was wrongful and without cause. But if he has compelled her to leave him by cruelty, misconduct, or ill-treatment, he forfeits his marital right to her society, and cannot maintain action against any one who harbors her, though after notice given. The material point of inquiry, in actions of this kind, is the intent with which the defendant acted; a mere act of hospitality will not render him responsible; and if he be the wife's father, stronger evidence of malicious intent will be required than in the case of a stranger, the presumption being that he was actuated by proper motives. (*Bennett v. Smith*, 21 Barb. 439; *Heermance v. James*, 47 Barb. 120; *Holtz v. Dick*, 42 O. St. 23; see 49 Mich. 529; 101 Ind. 160; 106 Pa. St. 373; 82 Mo. 534.)

injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary. But these are properly increased and diminished by circumstances; as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the seduction or otherwise of the wife, founded on her previous behavior and character; and the husband's obligation by settlement or otherwise to provide for those children, which he cannot but suspect to be spurious. In this case, and upon indictments for polygamy, a marriage *in fact* must be proved; though generally, in other cases, reputation and cohabitation are sufficient evidence of marriage. 3. The third injury is that of *beating* a man's wife, or otherwise ill-using her; for which, if it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass *vi et armis*, which must be brought in the names of the husband and wife *jointly*: but if the beating or other mal-treatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives a *separate* remedy by an action of trespass, in nature of an action upon the case, for this ill-usage, *per quod consortium amisit*; in which he shall recover a satisfaction in damages.†

II. Injuries that may be offered to a person considered in the relation of a *parent* were likewise of two kinds: 1. *Abduction*, or taking his children away; and, 2. *Marrying* his son and heir without the father's consent, whereby during the continuance of the military tenures he lost the value of his marriage. But this last injury is now ceased, together with the right upon which it was grounded; for, the father being no longer entitled to the value of the marriage, the marrying his heir does him no sort of injury for which a civil action will lie. As to the other, of abduction, or taking away the children from the father, that is also a matter of doubt whether it be a civil injury or no; for, before the abolition of the tenure in chivalry, it was equally a doubt whether an action would lie for taking and carrying away any other child besides the heir: some holding that it would not, upon the supposition that the only ground or cause of action was losing the value of the heir's marriage; and others holding that an action would lie for taking away *any* of the children, for that the parent

† As to actions for criminal conversation, see *ante*, p. 150, note 14; also 89 Ind. 118; 134 Mass. 123; 62 N. H. 675; for personal injury to wife, see 83 N. Y. 595; 32 Minn. 243; 107 Ind. 32.

hath an interest in them all, to provide for their education. If therefore before the abolition of these tenures it was an injury to the father to take away the rest of his children, as well as his heir (as I am inclined to think it was), it still remains an injury, and is remediable by writ of *ravishment*, or action of *trespass vi et armis, de filio, vel filia, rapto vel abducto*; in the same manner as the husband may have it, on account of the abduction of his wife.¹⁶

III. Of a similar nature to the last is the relation of *guardian and ward*, and the like actions *mutatis mutandis*, as are given to fathers, the guardian also has for recovery of damages, when his ward is stolen or ravished away from him. And though guardianship in chivalry is now totally abolished, which was the only beneficial kind of guardianship to the guardian, yet the guardian in socage was always and is still entitled to an action of *ravishment*, if his ward or pupil be taken from him: but then he must account to his pupil for the damages which he so recovers. And, as a guardian in socage was also entitled at common law to a writ of *right of ward, de custodia terræ et hæredis*, in order to recover the possession and custody of the infant, so I apprehend that he is still entitled to sue out this antiquated writ. But a more speedy and summary method of redressing all complaints relative to wards and guardians hath of late obtained by an application to the court of chancery; which is the supreme guardian, and has the superintendent jurisdiction of all the infants in the kingdom. And it is expressly provided by statute 12 Car. II., ch. 24, that testamentary guardians may maintain an action of ravishment or trespass, for recovery of any of their wards, and

¹⁶ Other injuries of a similar nature, which a person may sustain in his relation as parent, are (a) by *personal injury* to the child; (b) by *enticement* of the child from home, or harboring him wrongfully, after he has left his parents; (c) by *seduction* of a daughter. The ground on which the father sues, in all these cases, is loss of service resulting from the defendant's act. In case (a), the action of the father is in addition to one, which may be brought in the child's behalf for the direct personal injury. If the child is so young as to be incapable of rendering any service, the father's right of action will fail (*Hall v. Hollander*, 4 B. & C. 660); though it is held in one State, at least, that the father may, in such a case, recover for the trouble and expense incurred in the care and cure of the child. (2 Cush. 347; and see 109 N. Y. 95.) (b) For cases of action for enticement, see *Stowe v. Heywood*, 7 Allen, 118; *Nash v. Douglas*, 12 Abb. Pr. [N. S.] 187; *Caughy v. Smith*, 47 N. Y. 244. (c) The subject of *seduction* has been already considered. (See *ante*, p. 167, note 8.)

also for damages to be applied to the use and benefit of the infants.¹⁶

IV. To the relation between *master* and *servant*, and the rights accruing therefrom, there are two species of injuries incident. The one is, retaining a man's hired servant before his time is expired; the other is beating or confining him in such a manner that he is not able to perform his work. As to the first, the retaining another person's servant during the time he has agreed to serve his present master; this, as it is an ungentlemanlike, so it is also an illegal act. For every master has by his contract purchased for a valuable consideration the service of his domestics for a limited time: the inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master; and for that injury the law has given him a remedy by a special action on the case;¹⁷ and he may also have an action against the servant for the non-performance of his agreement. But, if the new master was not apprized of the former contract, no action lies against *him*, unless he refuses to restore the servant, upon demand. The other point of injury, is that of beating, confining, or disabling a man's servant, which depends upon the same principle as the last; *viz.*, the property which the master has by his contract acquired in the labor of the servant. In this case, besides the remedy of an action of battery or imprisonment, which the servant himself as an individual may have against the aggressor, the master also, as a recompense for *his* immediate loss, may maintain an action of trespass *vi et armis*; in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit*; and then the jury will make him a proportionable pecuniary satisfaction.¹⁸ A similar practice to which, we find also to have obtained among the Athenians; where masters were entitled to an action against such as beat or ill-treated their servants.

We may observe that in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, **by** the breach and dissolution of either the relation itself, or at

¹⁶ The guardian, being *in loco parentis*, may also maintain action for the seduction of a female ward. (See 4 N. Y. 38 and 60 N. H. 20.)

¹⁷ See *Scidmore v. Smith*, 13 Johns. 322; *Woodward v. Washburn*, 3 Denio, 369; *Caughy v. Smith*, 47 N. Y. 244; *Lumley v. Gye*, 2 E. & B. 216.

¹⁸ See *Duel v. Harding*, Strange, 595; *Hall v. Hollander*, 4 B. & C. 660; *Ames v. Union R. Co.*, 117 Mass. 541.

least the advantage, accruing therefrom : while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this : that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior ; and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in anything during her coverture.¹⁹ The child hath no property in his father or guardian ; as they have in him, for the sake of giving him education and nurture. And so the servant, whose master is disabled, does not thereby lose his maintenance or wages. He had no property in his master ; and if he receives his part of the stipulated contract, he suffers no injury, and is therefore entitled to no action, for any battery or imprisonment which such master may happen to endure.

CHAPTER VII.

[BL. COMM.—BOOK III. CH. IX.]

Of Injuries to Personal Property.

IN the preceding chapter we considered the wrongs or injuries that affected the rights of persons, either considered as individuals, or as related to each other ; and are at present to enter upon the discussion of such injuries as affect the rights of property, together with the remedies which the law has given to repair or redress them.

And here again we must follow our former division of property into personal and real ; *personal*, which consists in goods, money, and all other movable chattels, and things thereunto incident ; a property which may attend a man's person wherever he goes, and from thence receives its denomination : *real* property, which consists of such things as are permanent, fixed, and immovable ; as lands, tenements, and hereditaments of all kinds, which are not annexed to the person, nor can be moved from the place in which they subsist.

¹⁹ It is held in some States, under modern statutes, that a wife can recover damages against one who entices her husband away, alienates his affections, etc. (26 Fed. Rep. 13; 116 N. Y. 584.)

First then we are to consider the injuries that may be offered to the rights of *personal* property ; and, of these, first the rights of personal property in *possession*, and then those that are in *action* only.

I. The rights of personal property in *possession*, are liable to two species of injuries : the amotion or deprivation of that possession ; and the abuse or damage of the chattels, while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible into two branches ; the unjust and unlawful *taking* them away ; and the unjust *detaining* them, though the original taking might be lawful.

1. And first of an unlawful *taking*. The right of property in all external things being solely acquired by occupancy, as has been formerly stated, and preserved and transferred by grants, deeds, and wills, which are a continuation of that occupancy ; it follows, as a necessary consequence, that when I have once gained a rightful possession of any goods or chattels, either by a just occupancy or by a legal transfer, whoever either by fraud or force dispossesses me of them, is guilty of a transgression against the law of society, which is a kind of secondary law of nature. For there must be an end of all social commerce between man and man, unless private possessions be secured from unjust invasions : and if an acquisition of goods by either force or fraud were allowed to be a sufficient title, all property would soon be confined to the most strong, or the most cunning ; and the weak and simple-minded part of mankind (which is by far the most numerous division) could never be secure of their possessions.

The wrongful taking of goods being thus most clearly an injury, the next consideration is, what remedy the law of England has given for it. And this is, in the first place, the restitution of the goods themselves so wrongfully taken, with damages for the loss sustained by such unjust invasion ; which is effected by action of *replevin* ; an institution, which the Mirror ascribes to Glanvil, chief justice to King Henry the Second. This obtains only in one instance of an unlawful taking, that of a wrongful distress : and this and the action of *detinue* (of which I shall presently say more) are almost the only actions, in which the actual specific possession of the identical personal chattel is restored to the proper owner. For things personal are looked

upon by the law as of a nature so transitory and perishable, that it is for the most part impossible either to ascertain their identity, or to restore them in the same condition as when they came to the hands of the wrongful possessor. And, since it is a maxim that "*lex neminem cogit ad vana, seu impossibilia*," it therefore contents itself in general with restoring, not the thing itself, but a pecuniary equivalent to the party injured ; by giving him a satisfaction in damages. But in the case of a *distress*, the goods are from the first taking in the custody of the law, and not merely in that of the distrainer ; and therefore they may not only be identified, but also restored to their first possessor, without any material change in their condition.¹ And being thus in the custody of the law, the taking them back by force is looked upon as an atrocious injury, and denominated a *rescous*, for which the distrainer has a remedy in damages.

An action of replevin, the regular way of contesting the validity of the transaction, is founded, I said, upon a distress taken wrongfully and without sufficient cause : being a re-delivery of the pledge, or thing taken in distress, to the owner ; upon his giving security to try the right of the distress, and to restore it if the right be adjudged against him : after which the distrainer may keep it, till tender made of sufficient amends, but must then redeliver it to the owner. And formerly, when the party distrained upon intended to dispute the right of the distress, he had no other process by the old common law than by a writ of replevin, *replegiari facias* ; which issued out of chancery, commanding the sheriff to deliver the distress to the owner, and afterwards to do justice in respect of the matter in dispute in

¹ The remedy of replevin is not restricted in the United States to cases of wrongful distress, but extends to all cases where personal property has been unlawfully taken or detained from the rightful owner. The object of this action is to obtain a restoration of the specific property taken, and not, as in the action of trover, to recover damages for its loss. It is a concurrent remedy with trover, and either may be adopted by the plaintiff, at his option. The action may be maintained by one having a general property in the chattels, as the absolute owner, or by one who has a special property, as a bailee. The practice varies somewhat in different States, but is substantially similar, in its general features, to that detailed in the text. Statutory regulations will be found upon this subject, in many of the States. In New York, and some other States, which have adopted a code of civil procedure, the corresponding form of remedy is termed the "claim and delivery of personal property," or "an action to recover a chattel." (See 61 N. H. 340; 111 U. S. 176; 135 Mass. 45; 108 Ind. 512; 101 N. Y. 348.)

his own county-court. But this being a tedious method of proceeding, the beasts or other goods were long detained from the owner to his great loss and damage. For which reason the statute of Marlbridge directs, that (without suing a writ out of the chancery) the sheriff immediately, upon plaint to him made, shall proceed to replevy the goods. And, for the greater ease of the parties, it is farther provided by statute 1 P. & M., ch. 12, that the sheriff shall make at least four deputies in each county, for the sole purpose of making replevins. Upon application therefore, either to the sheriff or one of his said deputies, security is to be given, in pursuance of the statute of Westm. 2, 13 Edw. I., ch. 2. 1. That the party replevying will pursue his action against the distrainor, for which purpose he puts in *plegios de prosequendo*, or pledges to prosecute; and, 2. That if the right be determined against him, he will return the distress again, for which purposes he is also bound to find *plegios de retorno habendo*. Besides these pledges, the sufficiency of which is discretionary and at the peril of the sheriff, the statute 11 Geo. II., ch. 19, requires that the officer, granting a replevin on a distress for rent, shall take a bond with two sureties in a sum of double the value of the goods distrained, conditioned to prosecute the suit with effect and without delay, and for return of the goods; which bond shall be assigned to the avowant or person making cognizance, on request made to the officer; and, if forfeited, may be sued in the name of the assignee. And certainly, as the end of all distresses is only to compel the party distrained upon to satisfy the debt or duty owing from him, this end is as well answered by such sufficient sureties as by retaining the very distress, which might frequently occasion great inconvenience to the owner; and that the law never wantonly inflicts. The sheriff, on receiving such security, is immediately, by his officers, to cause the chattels taken in distress to be restored into the possession of the party distrained upon; unless the distrainor claims a property in the goods so taken. For if, by this method of distress, the distrainor happens to come again into possession of his own property in goods which before he had lost, the law allows him to keep them, without any reference to the manner by which he thus has gained possession; being a kind of personal *remitter*. If therefore the distrainor claims any such property, the party replevying must sue out a writ *de proprietate*

probanda, in which the sheriff is to try, by an inquest, in whom the property previous to the distress subsisted. And if it be found to be in the distrainor, the sheriff can proceed no farther; but must return the claim of property to the court of king's bench or common pleas, to be there farther prosecuted, if thought advisable, and there finally determined.

But in common cases, the goods are delivered back to the party replevying, who is then bound to bring his action of replevin; which may be prosecuted in the county-court, be the distress of what value it may. But it is usual to carry it up in the first instance to the courts of Westminster-hall. Upon this action brought, and declaration delivered, the distrainor, who is now the defendant, makes *avowry*; that is, he *avows* taking the distress in his own right, or the right of his wife; and sets forth the reason of it, as for rent arrere, damage done, or other cause: or else, if he justifies in another's right as his bailiff or servant, he is said to make *cognizance*; that is, he *acknowledges* the taking, but insists that such taking was legal, as he acted by the command of one who had a right to distrain; and on the truth and legal merits of this avowry or cognizance the cause is determined. If it be determined for the plaintiff, *viz.*: that the distress was wrongfully taken; he has already got his goods back into his own possession, and shall keep them, and moreover recover damages. But if the defendant prevails, by the default or nonsuit of the plaintiff, then he shall have a writ *de retorno habendo*, whereby the goods or chattels (which were distrained and then replevied) are returned again into his custody; to be sold, or otherwise disposed of, as if no replevin hath been made.

In like manner, other remedies for other unlawful takings of a man's goods consist only in recovering a satisfaction in damages. And if a man takes the goods of another out of his actual or virtual possession, without having a lawful title so to do, it is an injury; which, though it doth not amount to felony unless it be done *anima furandi*, is nevertheless a transgression, for which an action of *trespass vi et armis* will lie; wherein the plaintiff shall not recover the thing itself, but only damages for the loss of it. Or, if committed without force, the party may, at his choice, have another remedy in damages by action of *trover and conversion*, of which I shall presently say more.

2. Deprivation of possession may also be by an unjust *de-*

tainer of another's goods, though the original *taking* was lawful. As if I distrain another's cattle damage-feasant, and before they are impounded he tenders me sufficient amends ; now, though the original taking was lawful, my subsequent detainment of them after tender of amends is wrongful, and he shall have an action of *replevin* against me to recover them : in which he shall recover damages only for the *detention* and not for the *caption* because the original taking was lawful. Or, if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining, and not in the original taking, and the regular method for me to recover possession is by action of *detinue*. In this action of *detinue*, it is necessary to ascertain the thing detained, in such a manner as that it may be specifically known and recovered. Therefore it cannot be brought for money, corn, or the like ; for that cannot be known from other money or corn ; unless it be in a bag or a sack, for then it may be distinguishably marked. In order, therefore, to ground an action of *detinue*, which is only for the *detaining*, these points are necessary : 1. That the defendant came lawfully into possession of the goods, as either by delivery to him, or finding them ; 2. That the plaintiff have a property ; 3. That the goods themselves be of some value ; and, 4. That they be ascertained in point of identity. Upon this the jury, if they find for the plaintiff, assess the respective values of the several parcels detained, and also damages for the detention. And the judgment is conditional ; that the plaintiff recover the said goods, or (if they cannot be had) their respective values, and also the damages for detaining them. But there is one disadvantage which attends this action ; *viz.*, that the defendant is herein permitted to wage his law, that is, to exculpate himself by oath, and thereby defeat the plaintiff of his remedy : which privilege is grounded on the confidence originally reposed in the bailee by the bailor, in the borrower by the lender, and the like ; from whence arose a strong presumptive evidence, that in the plaintiff's own opinion the defendant was worthy of credit. But for this reason the action itself is of late much disused, and has given place to the action of *trover*.²

² Wager of law was abolished by statute 3 & 4 Will., IV., ch. 42, and *detinue* was afterwards employed more frequently. This form of remedy has fallen into disuse, or been superseded by other actions, in many of the United States.

This action of *trover* and *conversion* was in its original an action of trespass upon the case, for recovery of damages against such person as had *found* another's goods, and refused to deliver them on demand, but *converted* them to his own use ; from which finding and converting it is called an action of *trover* and *conversion*. The freedom of this action from wager of law, and the less degree of certainty requisite in describing the goods, gave it so considerable an advantage over the action of *detinue*, that by a fiction of law actions of *trover* were at length permitted to be brought against any man who had in his possession by any means whatsoever the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded. The injury lies in the conversion : for any man may take the goods of another into possession, if he finds them ; but no finder is allowed to acquire a property therein, unless the owner be for ever unknown : and therefore he must not convert them to his own use, which the law presumes him to do, if he refuses them to the owner : for which reason such refusal also is *prima facie*, sufficient evidence of a conversion. The fact of the finding, or *trover*, is therefore now totally immaterial : for the plaintiff needs only to suggest (as words of form) that he lost such goods, and that the defendant found them : and if he proves that the goods are *his* property, and that the defendant had them in his possession, it is sufficient. But a conversion must be fully proved : and then in this action the plaintiff shall recover damages, equal to the value of the thing converted, but not the thing itself : which nothing will recover but an action of *detinue* or *replevin*.

As to the damage that may be offered to things personal, while in the possession of the owner, as hunting a man's deer, shooting his dogs, poisoning his cattle, or in anywise taking from the value of any of his chattels, or making them in a worse condition than before, these are injuries too obvious to need explication. I have only therefore to mention the remedies given by the law to redress them, which are in two shapes ; by action of *trespass vi et armis*, where the act is in itself *immediately* injurious to another's property, and therefore necessarily accompanied with some degree of force ; and by special action *on the case*, where the act is in itself indifferent, and the injury only *consequential*, and therefore arising without any breach of

the peace. In both of which suits the plaintiff shall recover damages, in proportion to the injury which he proves that his property has sustained. And it is not material whether the damage be done by the defendant himself, or his servants by his direction ; for the action will lie against the master as well as the servant. And, if a man keeps a dog or other brute animal, used to do mischief, as by worrying sheep, or the like, the owner must answer for the consequences, if he knows of such evil habit.³

II. Hitherto of injuries affecting the right of things personal, in *possession*. We are next to consider those which regard things in *action* only ; or such rights as are founded on, and arise from, *contracts* ; the nature and several divisions of which were explained in the preceding volume. The violation, or non-performance, of these contracts might be extended into as great a variety of wrongs, as the rights which we then considered ; but I shall now consider them in a more comprehensive view, by here making only a twofold division of contracts ; *vis.*, contracts *express*, and contracts *implied* ; and pointing out the injuries that arise from the violation of each, with their respective remedies.

Express contracts include three distinct species ; debts, covenants, and promises.

1. The legal acceptation of *debt* is, a sum of money due by certain and express agreement : as, by a bond for a determinate sum ; a bill or note ; a special bargain : or a rent reserved on a lease ; where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it. The non-payment of these is an injury, for which the proper remedy is by action of *debt* to compel the performance of the contract and recover the specific sum due. This is the shortest and surest

³ See *Marble v. Ross*, 124 Mass. 44 ; *Godeau v. Blood*, 52 Vt. 251 ; *Perkins v. Mossman*, 44 N. J. L. 579. The knowledge of the owner of the animal's vicious propensity is termed technically, "*scienter*," and must be specially alleged and proved. But this is only true of animals which are ordinarily of an inoffensive disposition, as dogs, cattle, etc. If animals be of a savage nature, the owner is absolutely responsible for injuries committed by them, and proof of *scienter* is not required ; as if, for example, wild beasts in a menagerie should escape and do injury. And even in the case of domestic animals, if the action is brought on the ground that they have committed a *trespass* upon the plaintiff's premises, no proof of *scienter* is necessary. (See *Muller v. McKesson*, 73 N. Y. 195 ; *Spring Co. v. Edgar*, 99 U. S. 645.)

remedy ; particularly where the debt arises upon a specialty, that is, upon a deed or instrument under seal. So also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies against me ; for this is also a *determinate* contract ; but if I agree for no settled price, I am not liable to an action of debt, but a special action on the case, according to the nature of my contract. And indeed actions of debt are now seldom brought but upon special contract under seal ; wherein the sum due is clearly and precisely expressed ; for, in case of such an action upon a simple contract, the plaintiff labors under two difficulties. First, the defendant has here the same advantage as in an action of *detinue*, that of waging his law, or purging himself of the debt by oath, if he thinks proper. Secondly, in an action of debt the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single cause of action, fixed and determined ; and which, therefore, if the proof varies from the claim, cannot be looked upon as the same contract whereof the performance is sued for.⁴ If, therefore, I bring an action of debt for 30*l.*, I am not at liberty to prove a debt of 20*l.*, and recover a verdict thereon ; any more than if I bring an action of *detinue* for a horse, I can thereby recover an ox. For I fail in the proof of that contract, which my action or complaint has alleged to be specific, express, and determinate. But in an action on the case, on what is called an *indebitatus assumpsit*, which is not brought to compel a specific performance of the contract, but to recover damages for its non-performance, the implied *assumpsit*, and consequently the damages for the breach of it, are in their nature indeterminate ; and will, therefore, adapt and proportion themselves to the truth of the case which shall be proved, without being confined to the precise demand stated in the declaration. For, if *any* debt be proved, however, less than the sum demanded, the law will raise a promise *pro tanto*, and the damages will of course be proportioned to the actual debt. So that I may declare that the defendant, *being indebted* to me in 30*l.* *undertook* or promised to pay it, but failed ; and lay my damages arising from such failure at what sum I please : and the jury will, according to the nature of my proof, allow me

⁴ But it was subsequently settled that the plaintiff, in an action of debt, might prove and recover less than the sum demanded in the writ.

either the whole in damages, or any inferior sum. And, even in actions of *debt*, where the contract is proved or admitted, if the defendant can show that he has discharged any part of it, the plaintiff shall recover the residue.

The form of the writ of *debt* is sometimes in the *debet* and *detinet*, and sometimes in the *detinet* only: that is, the writ states, either that the defendant *owes* and unjustly *detains* the debt or thing in question, or only that he unjustly *detains* it. It is brought in the *debet* as well as *detinet*, when sued by one of the original contracting parties who personally gave the credit, against the other who personally incurred the debt, or against his heirs, if they are bound to the payment; as by the obligee against the obligor, the landlord against the tenant, *etc.* But, if it be brought by or against an executor for a debt due to or from the testator, this not being his own debt, shall be sued for in the *detinet* only. So also if the action be for goods, or corn, or a horse, the writ shall be in the *detinet* only; for nothing but a sum of money, for which I (or my ancestors in my name) have personally contracted, is properly considered as my *debt*. And, indeed, a writ of *debt* in the *detinet* only, for goods and chattels, is neither more nor less than a mere writ of *detinue*; and is followed by the very same judgment.

2. A covenant, also, contained in a deed, to do a direct act or to omit one, is another species of express contracts, the violation or breach of which is a civil injury. As if a man covenants to be at York by such a day, or not to exercise a trade in a particular place, and is not at York at the time appointed, or carries on his trade in the place forbidden, these are direct breaches of his covenant; and may be perhaps greatly to the disadvantage and loss of the covenantee. The remedy for this is by a writ of *covenant*: which directs the sheriff to command the defendant generally to keep his covenant with the plaintiff (without specifying the nature of the covenant), or show good cause to the contrary: and if he continues refractory, or the covenant is already so broken that it cannot now be specifically performed, . . . then the subsequent proceedings set forth with precision the covenant, the breach, and the loss which has happened thereby; whereupon the jury will give damages, in proportion to the injury sustained by the plaintiff, and occasioned by such breach of the defendant's contract.

No person could at common law take advantage of any covenant or condition, except such as were parties or privies thereto ; and, of course, no grantee or assignee of any reversion or rent. To remedy which, and more effectually to secure to the king's grantees the spoils of the monasteries then newly dissolved, the statute 32 Hen. VIII., ch. 34, gives the assignee of a reversion (after notice of such assignment) the same remedies against the particular tenant, by entry or action, for waste or other forfeitures, non-payment of rent, and non-performance of conditions, covenants, and agreements, as the assignor himself might have had ; and makes him equally liable, on the other hand, for acts agreed to be performed by the assignor, except in the case of warranty.

3. A promise is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. If therefore it be to do any explicit act, it is an express contract, as much as any covenant ; and the breach of it is an equal injury. The remedy indeed is not exactly the same : since, instead of an action of covenant, there only lies an action upon the case, for what is called the *assumpsit* or undertaking of the defendant ; the failure of performing which is the wrong or injury done to the plaintiff, the damages whereof a jury are to estimate and settle. And if a builder promises, undertakes, or assumes to Caius, that he will build and cover his house within a time limited, and fails to do it ; Caius has an action on the case against the builder, for this breach of his express promise, undertaking, or *assumpsit*, and shall recover a pecuniary satisfaction for the injury sustained by such delay. So also in the case before mentioned, of a debt by simple contract, if the debtor promises to pay it and does not, this breach of promise entitles the creditor to his action on the case, instead of being driven to an action of debt. Thus likewise a promissory note, or note of hand not under seal, to pay money at a day certain, is an express *assumpsit* ; and the payee at common law, or by custom and act of parliament the indorsee, may recover the value of the note in damages, if it remains unpaid. Some agreements indeed, though never so expressly made, are deemed of so important a nature, that they ought not to rest in verbal promise only, which cannot be proved but by the memory (which sometimes will induce the perjury) of witnesses. To prevent which

the statute of frauds and perjuries, 29 Car. II., ch. 3, enacts, that in the five following cases no verbal promise shall be sufficient to ground an action upon, but at the least some note or *memorandum* of it shall be made in writing, and signed by the party to be charged therewith: 1. Where an executor or administrator promises to answer damages out of his own estate. 2. Where a man undertakes to answer for the debt, default, or miscarriage of another. 3. Where any agreement is made, upon consideration of marriage. 4. Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein. 5. And lastly, where there is any agreement that is not to be performed within a year from the making thereof. In all these cases a mere verbal *assumpsit* is void.

From these *express* contracts the transition is easy to those that are only *implied* by law. Which are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform; and upon this presumption makes him answerable to such persons as suffer by his non-performance.

Of this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law. For it is a part of the original contract, entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state, of which each individual is a member. Whatever therefore the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge. And this implied agreement it is, that gives the plaintiff a right to institute a second action, founded merely on the general contract, in order to recover such damages, or sum of money, as are assessed by the jury and adjudged by the court to be due from the defendant to the plaintiff in any former action. So that if he hath once obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, he may afterwards bring an action of debt upon this judgment, and shall not be put upon the proof of the original cause of action; but upon shewing the judgment once obtained, still in full force,

and yet unsatisfied, the law immediately implies, that by the original contract of society the defendant hath contracted a debt, and is bound to pay it. This method seems to have been invented, when *real* actions were more in use than at present, and damages were permitted to be recovered thereon; in order to have the benefit of a writ of *capias* to take the defendant's body in execution for those damages, which process was allowable in an action of debt (in consequence of the statute 25 Edw. III., ch. 17), but not in an action real. Wherefore, since the disuse of those real actions, actions of debt upon judgment in personal suits have been pretty much discountenanced by the courts, as being generally vexatious and oppressive, by harassing the defendant with the costs of two actions instead of one.

On the same principle it is (of an implied original contract to submit to the rules of the community whereof we are members), that a forfeiture imposed by the by-laws and private ordinances of a corporation upon any that belong to the body, or an amercement set in a court-leet or court-baron upon any of the suitors to the court (for otherwise it will not be binding), immediately create a debt in the eye of the law: and such forfeiture or amercement, if unpaid, work an injury to the party or parties entitled to receive it: for which the remedy is by action of debt.

The same reason may with equal justice be applied to all penal statutes, that is, such acts of parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party offending is here bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires. The usual application of this forfeiture is either to the party aggrieved, or else to any of the king's subjects in general. Of the former sort is the forfeiture inflicted by the statute of Winchester (explained and enforced by several subsequent statutes) upon the hundred wherein a man is robbed, which is meant to oblige the hundredors to make hue and cry after the felon; for if they take him, they stand excused. But otherwise the party robbed is entitled to prosecute them by a special action on the case, for damages equivalent to his loss. And of the same nature is the action given by statute 9 Geo. I., ch. 22, commonly called the black act, against the inhabitants of any hundred, in order to

make satisfaction in damages to all persons who have suffered by the offences enumerated and made felony by that act. But more usually, these forfeitures created by statute are given at large to any common informer ; or, in other words, to any such person or persons as will sue for the same : and hence such actions are called *popular* actions, because they are given to the people in general. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor : and then the suit is called a *qui tam* action, because it is brought by a person "*qui tam pro domino rege, &c., quam pro se ipso in hac parte sequitur.*" If the king therefore himself commences this suit, he shall have the whole forfeiture. But if any one hath begun a *qui tam* or *popular*, action, no other person can pursue it : and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even to the king himself. This has frequently occasioned offenders to procure their own friends to begin a suit, in order to forestall and prevent other actions ; which practice is in some measure prevented by a statute made in the reign of a very sharp-sighted prince in penal laws, 4 Hen. VII., ch. 20, which enacts that no recovery, otherwise than by verdict, obtained by collusion in an action popular, shall be a bar to any other action prosecuted *bona fide*. A provision that seems borrowed from the rule of the Roman law, that if a person was acquitted of any accusation, merely by the prevarication of the accuser, a new prosecution might be commenced against him.

A second class of implied contracts are such as do not arise from the express determination of any court, or the positive direction of any statute, but from natural reason, and the just construction of law. Which class extends to all presumptive undertakings or *assumpsits* ; which though never perhaps actually made, yet constantly arise from the general implication and intendment of the courts of judicature, that every man hath engaged to perform what his duty or justice requires. Thus :—

1. If I employ a person to transact my business for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labor deserved. And if I neglect to make him amends, he has a remedy for this injury by bringing his action on the case upon this implied *assumpsit* ; wherein he is at liberty to suggest that I promised to pay him so much as he

reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merited. This is called an *assumpsit* on a *quantum meruit*.

2. There is also an implied *assumpsit* on a *quantum valebant*, which is very similar to the former, being only where one takes up goods or wares of a tradesman, without expressly agreeing for the price. There the law concludes, that both parties did intentionally agree, that the real value of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value.

3. A third species of implied *assumpsit* is when one has had and received money belonging to another, without any valuable consideration given on the receiver's part: for the law construes this to be money had and received for the use of the owner only; and implies that the person so receiving promised and undertook to account for it to the true proprietor. And, if he unjustly detains it, an action on the case lies against him for the breach of such implied promise and undertaking; and he will be made to repay the owner in damages, equivalent to what he has detained in violation of such his promise. This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex æquo et bono* he ought to refund. It lies for money paid by mistake or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where any undue advantage is taken of the plaintiff's situation.

4. Where a person has laid out and expended his own money for the use of another, at his request, the law implies a promise of repayment, and an action will lie on this *assumpsit*.

5. Likewise, fifthly, upon a stated account between two merchants, or other persons, the law implies that he against whom the balance appears has engaged to pay it to the other: though there be not any actual promise. And from this implication it is frequent for actions on the case to be brought, declaring that the plaintiff and defendant had settled their accounts together, *insimul computassent* (which gives name to this species of *assumpsit*), and that the defendant engaged to pay the plaintiff the bal-

ance, but has since neglected to do it. But if no account has been made up, then the legal remedy is by bringing a writ of *account, de computo* ; commanding the defendant to render a just account to the plaintiff, or show the court good cause to the contrary. In this action, if the plaintiff succeeds, there are two judgments : the first is, that the defendant do account (*quod computet*) before auditors appointed by the court ; and, when such account is finished, then the second judgment is, that he do pay the plaintiff so much as he is found in arrear. This action, by the old common law, lay only against the parties themselves, and not their executors ; because matters of account rested solely on their own knowledge. But this defect, after many fruitless attempts in parliament, was at last remedied by statute 4 Ann., ch. 16, which gives an action of account against the executors and administrators. But however it is found by experience, that the most ready and effectual way to settle these matters of account is by bill in a court of equity, where a discovery may be had on the defendant's oath, without relying merely on the evidence which the plaintiff may be able to produce. Wherefore actions of account, to compel a man to bring in and settle his accounts, are now very seldom used ; though, when an account is once stated, nothing is more common than an action upon the implied *assumpsit* to pay the balance.

6. The last class of contracts, implied by reason and construction of law, arises upon this supposition, that every one who undertakes any office, employment, trust, or duty, contracts with those who employ or entrust him, to perform it with integrity, diligence, and skill. And if, by his want of either of these qualities, any injury accrues to individuals, they have therefore their remedy in damages by a special action on the case. A few instances will fully illustrate this matter. If an officer of the public is guilty of neglect of duty, or a palpable breach of it, of non-feasance or of misfeasance ; as, if the sheriff does not execute a writ sent to him, or if he wilfully makes a false return thereof ; in both these cases the party aggrieved shall have an action *on the case*, for damages to be assessed by a jury. If a sheriff or gaoler suffers a prisoner, who is taken upon mesne process (that is, during the pendency of a suit), to escape, he is liable to an action *on the case*. But if, after judgment, a gaoler or a sheriff permits a debtor to escape, who is charged in execution for a

certain sum ; the debt immediately becomes his own, and he is compellable by action of *debt*, being for a sum liquidated and ascertained, to satisfy the creditor his whole demand : which doctrine is grounded on the equity of the statute of Westm. 2, 13 Edw. I., ch. 11, and 1 Ric. II., ch. 12. An advocate or attorney that betray the cause of their client, or, being retained, neglect to appear at the trial, by which the cause miscarries, are liable to an action on the case, for a reparation to their injured client. There is also in law always an implied contract with a common inn-keeper, to secure his guest's goods in his inn ; with a common carrier, or bargemaster, to be answerable for the goods he carries ; with a common farrier, that he shoes a horse well, without laming him ; with a common tailor, or other workman, that he performs his business in a workmanlike manner ; in which, if they fail, an action on the case lies to recover damages for such breach of their general undertaking. But if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such *general* undertaking, but, in order to charge him with damages, a *special* agreement is required. Also, if an inn-keeper, or other victualler, hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way ; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveller. If any one cheats me with false cards or dice, or by false weights and measures, or by selling me one commodity for another, an action on the case also lies against him for damages, upon the contract which the law always implies, that every transaction is fair and honest.

In contracts likewise for sales, it is constantly understood the seller undertakes that the commodity he sells is his own ; and if it proves otherwise, an action on the case lies against him, to exact damages for this deceit. In contracts for provisions, it is always implied that they are wholesome ; and if they be not, the same remedy may be had. Also if he, that selleth anything, doth upon the sale warrant it to be good, the law annexes a tacit contract to his warranty, that if it be not so, he shall make compensation to the buyer : else it is an injury to good faith, for which an action on the case will lie to recover damages.⁵ The

⁵ See *ante*, page 559, note 12.

warranty must be *upon the sale*: for if it be made *after*, and not *at* the time of the sale, it is a void warranty: for it is then made without any consideration; neither does the buyer then take the goods upon the credit of the vendor. Also the warranty can only reach to things in being at the time of the warranty made, and not to things *in futuro*: as, that a horse *is* sound at the buying of him, not that he *will be* sound two years hence. But if the vendor knew the goods to be unsound, and hath used any art to disguise them, or if they are in any shape different from what he represents them to be to the buyer, this artifice shall be equivalent to an express warranty, and the vendor is answerable for their goodness.⁶ A general warranty will not extend to guard against defects that are plainly and obviously the object of one's senses, as if a horse be warranted perfect, and wants either a tail or an ear, unless the buyer in this case be blind. But if cloth is warranted to be of such a length, when it is not, there an action on the case lies for damages; for that cannot be discerned by sight, but only by a collateral proof, the measuring it. Also if a horse is warranted sound, and he wants the sight of an eye, though this seems to be the object of one's senses, yet as the discernment of such defects is frequently matter of skill, it hath been held that an action on the case lieth to recover damages for this imposition.⁷

⁶ A distinction must be carefully drawn between an action upon contract for breach of warranty, and an action in tort for fraud connected with a warranty. This is more important, because early English cases held that, if a warranty were in fact false, the vendor was chargeable with fraud and deceit, though he had no knowledge of the defect at the time of the sale, and no intention to deceive. (See *Williamson v. Allison*, 2 East, 450.) But in modern times it is held that an action for fraud and deceit cannot be maintained without proof of *scienter*, or of intent to deceive. A warranty, therefore, may be false and not fraudulent, so that an action for breach of contract only can be maintained. Or it may be both false and fraudulent, so that the purchaser may have his choice of remedies,—to sue either in contract upon the warranty, or in tort for the fraud. (See 51 N. Y. 108; 28 N. H. 118 & 128.) In some States, however, the form of action in suing for breach of a false warranty may be either tort or contract; but then *scienter*, though alleged, need not be proved. (122 U. S. 575; 14 R. I. 578.)

⁷ The various forms of action considered in this chapter, and not already referred to in previous notes, viz., trover, trespass, debt, covenant, assumpsit, and case, were introduced into the practice of the several American States from the English practice, and had similar scope and extent of application. In a number of the States they have been continued until the present day in substantially the same form, though diverse modifications have been made

Thus much for the non-performance of contracts express or implied; which includes every possible injury to what is by far the most considerable species of personal property; *viz.* that which consists in action merely, and not in possession. Which finishes our inquiries into such wrongs as may be offered to *personal* property, with their several remedies by suit or action.

CHAPTER VIII.

[BL. COMM.—BOOK III. CH. X.]

Of Injuries to Real Property; and first of Dispossession, or Ouster of the Freehold.

I COME now to consider such *injuries* as affect that species of property which the laws of England have denominated *real*; as being of a more substantial and permanent nature, than those transitory rights of which personal chattels are the object.

Real injuries then, or injuries affecting real rights, are principally four; 1. Ouster; 2. Trespass; 3. Nuisance; 4. Waste.

Ouster, or dispossession, is a wrong or injury that carries with it the amotion of possession: for thereby the wrongdoer gets into the actual occupation of the land or hereditament, and obliges him that hath a right to seek his legal remedy, in order

in different States, by statute regulations. But in New York, and a number of the other States, the diverse forms of actions previously existing, have been abolished; and there is declared to be but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which is denominated a "civil action." But although *formal* differences have been abolished, *substantial* distinctions between actions for diverse kinds of injuries still exist. Thus, the action brought to recover damages for conversion of chattels, is no longer termed *trover*, and it is not now necessary to allege a finding of the goods by the defendant; but the nature of the proof to be established, and the rules in regard to the parties to such a suit, and the measure of damages to be awarded, are virtually the same as in the former action of *trover*. So it is evident that an action to recover specific personal property differs from actions for damages, as *replevin* differed from similar actions. In like manner, the distinction between legal and equitable suits and remedies still exists, though the same form of action is brought in all cases. (*Austin v. Rawdon*, 44 N. Y. 63; *Goulet v. Asseler*, 22 N. Y. 225.)

to gain possession and damages for the injury sustained. And such ouster, or dispossession, may either be of the *freehold* or of *chattels real*. Ouster of the *freehold* is effected by one of the following methods: 1. Abatement; 2. Intrusion; 3. Disseizin. All of which in their order, and afterwards their respective remedies, will be considered in the present chapter.

1. And first, an *abatement* is where a person dies seized of an inheritance, and before the heir or devisee enters, a stranger who has no right makes entry, and gets possession of the freehold: this entry of him is called an abatement, and he himself is called an abator. It is to be observed that this expression, of *abating*, which is derived from the French, and signifies to quash, beat down, or destroy, is used by our law in three senses. The first, which seems to be the primitive sense, is that of abating or beating down a nuisance, of which we spoke in the beginning of this book; and in a like sense it is used in statute Westm. 1., 3 Edw. I., ch. 17, where mention is made of abating a castle or fortress; in which case it clearly signifies to pull it down, and level it with the ground. The second signification of abatement is that of abating a writ or action, of which we shall say more hereafter: here it is taken figuratively, and signifies the overthrow or defeating of such writ, by some fatal exception to it. The last species of abatement is that we have now before us; which is also a figurative expression to denote that the rightful possession or freehold of the heir or devisee is overthrown by the rude intervention of a stranger.

2. The second species of injury by ouster, or amotion of possession from the freehold, is by *intrusion*: which is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. And it happens where a tenant for term of life dieth seized of certain lands and tenements, and a stranger entereth thereon, after such death of the tenant, and before any entry of him in remainder or reversion. This entry and interposition of the stranger differ from an abatement in this; that an abatement is always to the prejudice of the heir, or immediate devisee; an intrusion is always to the prejudice of him in remainder or reversion.

3. The third species of injury by ouster, or privation of the freehold, is by *disseizin*. Disseizin is a wrongful putting out of him that is seized of the freehold. The two former species of

injury were by a wrongful entry where the possession was vacant ; but this is an attack upon him who is in actual possession, and turning him out of it. Those were an ouster from a freehold in law ; this is an ouster from a freehold in deed. Disseizin may be effected either in corporeal inheritances, or incorporeal. Disseizin of things corporeal, as of houses, lands, &c., must be by entry and actual dispossession of the freehold ; as if a man enters either by force or fraud into the house of another, and turns, or at least keeps, him or his servants out of possession. Disseizin of incorporeal hereditaments can not be an actual dispossession : for the subject itself is neither capable of actual bodily possession, or dispossession ; but it depends on their respective natures, and various kinds ; being in general nothing more than a disturbance of the owner in the means of coming at, or enjoying them.

In corporeal hereditaments, a man may frequently suppose himself to be disseized, when he is not so in fact, for the sake of entitling himself to the more easy and commodious remedy of an assize of *novel disseizin* (which will be explained in the sequel of this chapter), instead of being driven to the more tedious process of a writ of entry. The true injury of compulsive disseizin seems to be that of dispossessing the tenant, and substituting one's self to be the tenant of the lord in his stead ; in order to which in the times of pure feudal tenure the consent or connivance of the lord, who upon every descent or alienation personally gave, and who therefore alone could change, the seizin or investiture, seems to have been considered as necessary. But when in process of time the feudal form of alienations wore off, and the lord was no longer the instrument of giving actual seizin, it is probable that the lord's acceptance of rent or service, from him who had dispossessed another, might constitute a complete disseizin. Afterwards, no regard was had to the lord's concurrence, but the dispossessor himself was considered as the sole disseizor : and this wrong was then allowed to be remedied by entry only, without any form of law, as against the disseisor himself ; but required a legal process against his heir or alienee. And when the remedy by assize was introduced under Henry II. to redress such disseizins as had been committed within a few years next preceding, the facility of that remedy induced others, who were wrongfully kept out of the freehold, to

feign or allow themselves to be disseized, merely for the sake of the remedy.

The several species and degrees of injury by *ouster* being thus ascertained and defined, the next consideration is the remedy ; which is, universally, the *restitution* or *delivery of possession* to the right owner : and, in some cases, *damages* also for the unjust amotion. The methods, whereby these remedies, or either of them, may be obtained, are various.

1. The first is that extrajudicial and summary one, which we slightly touched in the first chapter of the present book, of *entry* by the legal owner, when another person, who hath no right, hath previously taken possession of lands or tenements. In this case the party entitled may make a formal, but peaceable, entry thereon, declaring that thereby he takes possession : which notorious act of ownership is equivalent to a feudal investiture by the lord : or he may enter on any part of it in the same county, declaring it to be in the name of the whole : but if it lies in different counties he must make different entries ; for the notoriety of such entry or claim to the *pares* or freeholders of Westmoreland, is not any notoriety to the *pares* or freeholders of Sussex. Also if there be *two* disseizors, the party disseized must make his entry on *both* ; or if *one* disseizor has conveyed the lands with livery to *two* distinct feoffees, entry must be made on *both* : for as their seizin is distinct, so also must be the act which devests that seizin. If the claimant be deterred from entering by menaces or bodily fear, he may make *claim*, as near to the estate as he can, with the like forms and solemnities : which claim is in force for only a year and a day. And this claim, if it be repeated once in the space of every year and a day (which is called *continual claim*), has the same effect with, and in all respects amounts to, a legal entry. Such an entry gives a man seizin, or puts into immediate possession him that hath right of entry on the estate, and thereby makes him complete owner, and capable of conveying it from himself by either descent or purchase.¹

¹ [But by statute 3 & 4 Will. IV., ch. 27, no person shall be deemed to have been in possession of any land within the meaning of that act, merely by reason of having made an entry thereon ; and no continual or other claim upon or near any land shall preserve any right of making an entry. The distinction between the law, as laid down by Blackstone and the present

For, in every complete title to lands, there are two things necessary ; the possession or seizin, and the right or property therein : or, as it is expressed in Fleta, *juris et seisinæ conjunctio*. Now if the possession be severed from the property, if A has the *jus proprietatis*, and B by some unlawful means has gained possession of the lands, this is an injury to A ; for which the law gives a remedy, by putting him in possession. Thus, as B, who was himself the wrongdoer, and hath obtained the possession by either fraud or force, hath only a *bare or naked possession*, with out any shadow of right ; A, therefore, who hath both the *right* of property and the *right* of possession, may put an end to his title at once, by the summary method of *entry*.

This remedy by entry must be pursued, according to statute 5 Ric. II., st. 1, ch. 8, in a peaceable and easy manner ; and not with force or strong hand. For, if one turns or keeps another out of possession forcibly, this is an injury of both a civil and a criminal nature.² The civil is remedied by immediate restitution ; which puts the ancient possessor *in statu quo* : the criminal injury, or public wrong, by breach of the king's peace, is punished by fine to the king. For by the statute 8 Hen. VI., ch. 9, upon complaint made to any justice of the peace, of a forcible entry, with strong hand, on lands or tenements ; or a forcible detainer after a peaceable entry ; he shall try the truth of the complaint by jury, and, upon force found, shall restore the possession to the party so put out : and in such case, or if any

laws as to an entry is, that by the former a bare entry on land was attended with a certain effect in keeping a right alive ; whereas, by the latter, it has no effect whatever, unless there be a change of possession. When this takes place, the remedy by entry is still in operation ; when not, an entry is of no avail, and this remedy no longer exists.]

The effect of entry has also been changed by statute, in many of the American States. Thus, in New York, it is provided that, in cases of disseizin or adverse possession, "no entry upon real estate shall be deemed sufficient, or valid as a claim, unless an action be commenced thereupon within one year after the making of such entry, and within twenty years from the time when the right to make such entry descended or accrued." (N. Y. Code Civ. Pro. § 367.)

² "An entry shall not be made into real property, but in the case where entry is given by law ; and in such case, only in a peaceable manner ; not with strong hand, nor with multitude of people." (N. Y. Code Civ. Pro. § 2233.) This is a reenactment of the statute of Richard, and similar statutes are found in most of the American States. (See *post*, p. 915, note 2.)

alienation be made to defraud the possessor of his right (which is likewise declared to be absolutely void) the offender shall forfeit, for the force found, treble damages to the party grieved, and make fine and ransom to the king. But this does not extend to such as endeavor to keep possession *manu forti*, after three years' peaceable enjoyment of either themselves, their ancestors, or those under whom they claim; by a subsequent clause of the same statute, enforced by statute 31 Eliz., ch. 11.

II. Thus far of remedies, when tenant or occupier of the land hath gained only a *mere* possession, and no apparent shadow of right. Next follow another class, which are in use where the title of the tenant or occupier is advanced one step nearer to perfection; so that he hath in him not only a bare possession, which may be destroyed by a bare entry, but also an *apparent right of possession*, which cannot be removed but by orderly course of law; in the process of which it must be shown, that though he hath at present possession and therefore hath the presumptive right, yet there is a right of possession, superior to his, residing in him who brings the action.

These remedies are either by a *writ of entry*, or an *assize*; which are actions merely *possessory*; serving only to regain that possession, whereof the demandant (that is, he who sues for the land) or his ancestors have been unjustly deprived by the tenant or possessor of the freehold, or those under whom he claims. They decide nothing with respect to the *right of property*; only restoring the demandant to that state or situation, in which he was (or by law ought to have been) before the dispossession committed. But this without any prejudice to the right of ownership: for, if the dispossessor has any legal claim, he may afterwards exert it, notwithstanding a recovery against him in those possessory actions. Only the law will not suffer him to be his own judge, and either take or maintain possession of the lands, until he hath recovered them by legal means: rather presuming the right to have accompanied the ancient seizin, than to reside in one who had no such evidence in his favor.

1. The first of these possessory remedies is by *writ of entry*: which is that which disproves the title of the tenant or possessor, by showing the unlawful means by which he entered or continues possession. The writ is directed to the sheriff, requiring him to "command the tenant of the land that he render

(in Latin, *præcipe quod reddat*), to the demandant the land in question, which he claims to be his right and inheritance ; and into which, as he saith, the said tenant had not entry but by (or after) a disseizin, intrusion, or the like, made to the said demandant, within the time limited by law for such actions ; or that upon refusal he do appear in court on such a day, to show wherefore he hath not done it." This is the original process, the *præcipe* upon which all the rest of the suit is grounded : wherein it appears, that the tenant is required, either to deliver seizin of the lands, or to show cause why he will not. This cause may be either a denial of the fact, of having entered by or under such means as are suggested, or a justification of his entry by reason of title in himself or in those under whom he makes claim : whereupon the possession of the land is awarded to him who produces the clearest right to possess it.

This remedial instrument, or writ of entry, is applicable to all the cases of ouster before mentioned.

2. The writ of *assize* is said to have been invented by Glanvil, chief justice to Henry the Second ; and, if so, it seems to owe its introduction to the parliament held at Northampton, in the twenty-second year of that prince's reign when justices in eyre were appointed to go round the kingdom in order to take these assizes : and the assizes themselves (particularly those of *mort d'ancestor* and *novel disseizin*), were clearly pointed out and described. As a writ of entry is a real action, which *disproves* the title of the tenant by showing the unlawful commencement of his possession ; so an assize is a real action, which *proves* the title of the demandant merely by showing his, or his ancestor's possession ; and these two remedies are in all other respects so totally alike, that a judgment or recovery in one is a bar against the other ; so that when a man's possession is once established by either of these possessory actions, it can never be disturbed by the same antagonist in any other of them. The word *assize* is derived by Sir Edward Coke from the Latin *assideo*, to sit together ; and it signifies, originally, the jury who try the cause, and sit together for that purpose. By a figure, it is now made to signify the court or jurisdiction, which summons this jury together by a commission of assize, or *ad assisas capiendas* ; and hence the judicial assemblies held by the king's commission in every county, as well to take these writs of assize, as to try

causes at *nisi prius*, are termed in common speech the *assizes*. By another somewhat similar figure, the name of assize is also applied to this action, for recovering possession of lands ; for the reason, saith Littleton, why such writs at the beginning were called assizes, was, for that in these writs the sheriff is ordered to summon a jury, or assize ; which is not expressed in any other original writ.

This remedy, by writ of assize, is only applicable to two species of injury by ouster, *viz. abatement*, and a recent or *novel disseizin*. If the abatement happened upon the death of the demandant's father or mother, brother or sister, uncle or aunt, nephew or niece, the remedy is by an assize of *mort d'ancestor*, or the death of one's ancestor. This writ directs the sheriff to summon a jury or assize, who shall view the land in question, and recognize whether such ancestor was seized thereof on the day of his death, and whether the demandant be the next heir ; soon after which the judges come down by the king's commission to take the recognition of assize : when, if these points are found in the affirmative, the law immediately transfers the possession from the tenant to the demandant.

An assize of *novel* (or recent) *disseizin* is an action of the same nature with the assize of *mort d'ancestor* before-mentioned, in that herein the demandant's possession must be shown. But it differs considerably in other points ; particularly in that it recites a complaint by the demandant of the disseizin committed, in terms of direct averment, whereupon the sheriff is commanded to re seize the land and all the chattels thereon, and keep the same in his custody till the arrival of the justices of assize (which in fact hath been usually omitted) ; and in the mean time to summon a jury to view the premises, and make recognition of the assize before the justices. At which time the tenant may plead either the general issues, *nul tort*, *nul disseizin*, or any special plea. And if, upon the general issue, the recognitors find an actual seizin in the demandant, and his subsequent disseizin by the present tenant ; he shall have judgment to recover his seizin, and damages for the injury sustained : being the only case in which damages were recoverable in any possessory actions at the common law ; the tenant being in all other cases allowed to retain the intermediate profits of the land, to enable him to perform the feudal service. But costs and damages were annexed to man/

other possessory actions by the statutes of Marlberge, 52 Hen. III., ch. 16, and Gloucester, 6 Edw. I., ch. 1.

In all these possessory actions there is a time of limitation settled, beyond which no man shall avail himself of the possession of himself or his ancestors, or take advantage of the wrongful possession of his adversary. For, if he be negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance, to recover the possession merely, both to punish his neglect (*nam leges vigilantibus, non dormientibus, subveniunt*;) and also because it is presumed that the supposed wrongdoer has in such a length of time procured a legal title, otherwise he would sooner have been sued.

III. By these several possessory remedies the right of possession may be restored to him that is unjustly deprived thereof. But the right of *possession* (though it carries with it a strong presumption), is not always conclusive evidence of the right of *property*, which may still subsist in another man. For, as one man may have the *possession*, and another the *right of possession*, which is recovered by these possessory actions : so one man may have the *right of possession*, and so not be liable to eviction by any possessory action, and another may have the *right of property*, which cannot be otherwise asserted than by the great and final remedy of a writ of right, or such correspondent writs as are in the nature of a writ of right.⁸

In case the right of possession be barred by a recovery upon the merits in a possessory action, or lastly by the statute of limitations, a claimant in fee-simple may have a *mere writ of right*; which is in its nature the highest writ in the law, and lieth only of an estate in fee-simple, and not for him who hath a less estate. This writ lies *concurrently* with all other real actions, in which an estate of fee-simple may be recovered : and it also lies *after* them, being as it were an appeal to the mere right, when judgment hath been had as to the possession in an inferior possessory action. But though a writ of right may be brought, where the demandant is entitled to the possession, yet it rarely is advisable to be brought in such cases ; as a more expeditious and easy remedy is had, without meddling with the property, by proving the demandant's own, or his ancestor's possession, and their illegal ouster, in one of the possessory

⁸ See *ante*, page 374, note 1.

actions. But in case the right of possession be lost by length of time, or by judgment against the true owner in one of these inferior suits, there is no other choice: this is then the only remedy that can be had; and it is of so forcible a nature, that it overcomes all obstacles, and clears all objections that may have arisen to cloud and obscure the title. And, after issue once joined in a writ of right, the judgment is absolutely final; so that a recovery had in this action may be pleaded in bar of any other claim or demand.

The pure, proper, or mere writ of right lies only, we have said, to recover lands in fee-simple, unjustly withheld from the true proprietor. But there are also some other writs which are said to be *in the nature of* a writ of right, because their process and proceedings do mostly (though not entirely) agree with the writ of right: but in some of them the fee-simple is not demanded; and in others not land, but some incorporeal hereditament.

In the progress of this action, the demandant must allege some seizin of the lands and tenements in himself, or else in some person under whom he claims, and then derive the right from the person so seized to himself; to which the tenant may answer by denying the demandant's right, and averring that he has more right to hold the lands than the demandant has to demand them: and this right of the tenant being shown, it then puts the demandant upon the proof of his title: in which, if he fails, or if the tenant hath shown a better, the demandant and his heirs are perpetually barred of their claim: but if he can make it appear that his right is superior to the tenant's, he shall recover the land against the tenant and his heirs for ever. But even this writ of right, however superior to any other, cannot be sued out at any distance of time. By statute 32 Henry VIII., ch. 2, seizin in a writ of right shall be within sixty years.

I have now gone through the several species of injury by ouster and dispossession of the freehold, with the remedies applicable to each. In considering which I have been unavoidably led to touch upon much obsolete and abstruse learning, as it lies intermixed with, and alone can explain the reason of, those parts of the law which are now more generally in use. For, without contemplating the whole fabric together, it is impossible to form any clear idea of the meaning and connection of those disjointed parts which still form a considerable branch of the modern law;

such as the doctrine of entries, the levying of fines, and the suffering of common recoveries. Neither indeed is any considerable part of that, which I have selected in this chapter from among the venerable monuments of our ancestors, so absolutely antiquated as to be out of *force*, though the whole is certainly out of *use*: there being but a very few instances for more than a century past of prosecuting any real action for land by writ of *entry*, *assize*, writ of *right*, or otherwise. The forms are indeed preserved in the practice of common recoveries; but they are forms and nothing else; for which the very clerks that pass them are seldom capable to assign the reason. But the title of lands is now usually tried in actions of *ejectment* or *trespass*; of which in the following chapters.⁴

⁴ The real actions mentioned in this chapter were abolished by statute 3 & 4 Will IV., ch. 27; and the action of ejectment became the only direct mode of procedure for trying the title to real property, although trespass is sometimes made indirectly available for that purpose. Only brief mention of these various writs has, therefore, been retained in this edition, so far as their historical importance is deemed to warrant. In the United States, also, real and mixed actions, except ejectment, have been abolished or fallen into desuetude, and ejectment (which in some States is termed, "writ of entry," or "real action"), has become the ordinary remedy to try the title to lands. But the procedure in an action of ejectment has been much simplified and improved, as compared with the former practice. (See next chapter.)

CHAPTER IX.

[BL. COMM.—BOOK III. CH. XI.]

Of Dispossession, or Ouster, of Chattels Real.

HAVING in the preceding chapter considered with some attention the several species of injury by dispossession or ouster of the *freehold*, together with the regular and well-connected scheme of remedies by actions real, which are given to the subject by the common law, either to recover the possession only, or else to recover at once the possession, and also to establish the right of property; the method which I there marked out leads me next to consider injuries by ouster of *chattels real*; that is, by amoving the possession of the tenant from an estate by statute-merchant, statute-staple, recognizance in the nature of it, or *elegit*; or from an estate for years.

I. Ouster, or amotion of possession, from estates held by statute, recognizance, or *elegit*, is only liable to happen by a species of disseizin, or turning out of the legal proprietor, before his estate is determined by raising the sum for which it is given him in pledge. And for such ouster, though the estate be merely a chattel interest, the owner shall have the same remedy as for an injury to a freehold; *viz.* by assize of *novel disseizin*.

II. As for *ouster*, or amotion of possession, from an *estate for years*; this happens only by a like kind of disseizin, ejection, or turning out, of the tenant from the occupation of the land during the continuance of his term. For this injury the law has provided him with two remedies, according to the circumstances and situation of the wrongdoer: the writ of *ejectione firmæ*; which lies against any one, the lessor, reversioner, remainder-man, or any stranger, who is himself the wrongdoer and has committed the injury complained of: and the writ of *quare ejecit infra terminum*; which lies not against the wrongdoer or ejector himself, but his *feoffee* or other person claiming under him. These are mixed actions, somewhat between real and personal; for therein are two things recovered, as well restitution of the term of years, as damages for the ouster or wrong.

I. A writ then of *ejectione firmæ*, or action of trespass in *ejectment*, lieth where lands or tenements are let for a term of years ; and afterwards the lessor, reversioner, remainder-man, or any stranger, doth eject or oust the lessee of his term. In this case he shall have his writ of *ejection* to call the defendant to answer for entering on the lands so demised to the plaintiff for a term that is not yet expired, and ejecting him. And by this writ the plaintiff shall recover back his term, or the remainder of it, with damages.

Since the disuse of real actions, this mixed proceeding is become the common method of trying the title to lands or tenements. It may not therefore be improper to delineate, with some degree of minuteness, its history, the manner of its process, and the principles whereon it is grounded.

The remedy by ejectment is in its original an action brought by one who hath a lease for years, to repair the injury done him by dispossession. In order therefore to convert it into a method of trying titles to the freehold, it is first necessary that the claimant do take possession of the lands, to empower him to constitute a lessee for years, that may be capable of receiving this injury of dispossession. For it would be an offence, called in our law *maintenance* (of which in the next book), to convey a title to another, when the grantor is not in possession of the land ; and indeed it was doubted at first, whether this occasional possession, taken merely for the purpose of conveying the title, excused the lessor from the legal guilt of maintenance. When therefore a person, who hath right of entry into lands, determines to acquire that possession, which is wrongfully withheld by the present tenant, he makes (as by law he may) a formal entry on the premises ; and being so in the possession of the soil, he there, upon the land, seals and delivers a lease for years to some third person or lessee : and, having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land, till the prior tenant, or he who had the previous possession, enters thereon afresh and ousts him ; or till some other person (either by accident or by agreement before-hand) comes upon the land, and turns him out or ejects him. For this injury the lessee is entitled to his action of ejectment against the tenant or this *casual ejector*, whichever it was that ousted him, to recover back his term and damages. But where this action is brought

against such a casual ejector as is before mentioned, and not against the very tenant in possession, the court will not suffer the tenant to lose his possession without any opportunity to defend it. Wherefore it is a standing rule, that no plaintiff shall proceed in ejectment to recover lands against a casual ejector, without notice given to the tenant in possession (if any there be), and making him a defendant if he pleases. And, in order to maintain the action, the plaintiff must, in case of any defence, make out four points before the court ; viz. *title, lease, entry, and ouster*. First, he must show a good *title* in his lessor, which brings the matter of right entirely before the court ; then, that the lessor, being seized or possessed by virtue of such title, did make him the *lease* for the present term ; thirdly, that he, the lessee or plaintiff, did *enter* or take possession in consequence of such lease ; and then, lastly, that the defendant *ousted* or ejected him. Whereupon he shall have judgment to recover his term and damages ; and shall, in consequence, have a *writ of possession*, which the sheriff is to execute by delivering him the undisturbed and peaceable possession of his term.

This is the regular method of bringing an action of ejectment in which the title of the lessor comes collaterally and incidentally before the court, in order to show the injury done to the lessee by this ouster. This method must be still continued in due form and strictness, save only as to the notice to the tenant, whenever the possession is vacant, or there is no actual occupant of the premises ; and also in some other cases. But, as much trouble and formality were found to attend the actual making of the *lease, entry, and ouster*, a new and more easy method of trying titles by writ of ejectment, where there is any actual tenant or occupier of the premises in dispute, was invented somewhat more than a century ago, by the lord chief justice Rolle, who then sat in the court of *upper bench* ; so called during the exile of King Charles the Second. This new method entirely depends upon a string of legal fictions ; no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant ; but all are merely ideal, for the sole purpose of trying the title. To this end, in the proceedings a lease for a term of years is stated to have been made, by him who claims title, to the plaintiff who brings the action, as by John Rogers to Richard Smith, which plaintiff ought to be some real person, and not merely an

ideal fictitious one who hath no existence, as is frequently though unwarrantably practised ; it is also stated that Smith the lessee entered ; and that the defendant William Stiles, who is called the *casual ejector*, ousted him ; for which ouster he brings this action. As soon as this action is brought, and the complaint fully stated in the declaration, Stiles, the casual ejector, or defendant, sends a written notice to the tenant in possession of the lands, as George Saunders, informing him of the action brought by Richard Smith, and transmitting him a copy of the declaration ; withal assuring him that he, Stiles the defendant, has no title at all to the premises, and shall make no defence ; and therefore advising the tenant to appear in court and defend his own title : otherwise he, the casual ejector, will suffer judgment to be had against him : and thereby the actual tenant Saunders will inevitably be turned out of possession. On receipt of this friendly caution, if the tenant in possession does not within a limited time apply to the court to be admitted a defendant in the stead of Stiles, he is supposed to have no right at all ; and upon judgment being had against Stiles the casual ejector, Saunders the real tenant will be turned out of possession by the sheriff.

But, if the tenant in possession applies to be made a defendant, it is allowed him upon this condition ; that he enter into a rule of court to confess, at the trial of the cause, three of the four requisites for the maintenance of the plaintiff's action ; *viz.* the *lease* of Rogers the lessor, the *entry* of Smith the plaintiff, and his *ouster* by Saunders himself, now made the defendant instead of Stiles : which requisites being wholly fictitious, should the defendant put the plaintiff to prove them, he must of course be nonsuited for want of evidence ; but by such stipulated confession of *lease*, *entry* and *ouster*, the trial will now stand upon the merits of the *title* only. This done, the declaration is altered by inserting the name of George Saunders instead of William Stiles, and the cause goes down to trial under the name of Smith (the plaintiff) on the demise of Rogers (the lessor), against Saunders, the new defendant. And therein the lessor of the plaintiff is bound to make out a clear title, otherwise his fictitious lessee cannot obtain judgment to have possession of the land for the term supposed to be granted. But, if the lessor makes out his title in a satisfactory manner, then judgment and a writ of possession shall go for Richard Smith the nominal plaintiff, who by

this trial has proved the right of John Rogers, his supposed lessor. Yet, to prevent fraudulent recoveries of the possession, by collusion with the tenant of the land, all tenants are obliged by statute 11 Geo. II., ch. 19, on pain of forfeiting three years' rent, to give notice to their landlords when served with any declaration in ejectment: and any landlord may by leave of the court be made a co-defendant to the action, in case the tenant himself appears to it; or, if he makes default, though judgment must be then signed against the casual ejector, yet execution shall be stayed, in case the landlord applies to be made a defendant, and enters into the common rule; a right, which indeed the landlord had, long before the provision of this statute; in like manner as (previous to the statute of Westm. 2, ch. 3) if in a real action the tenant of the freehold made default, the remainder-man or reversioner had a right to come in and defend the possession; lest, if judgment were had against the tenant, the estate of those behind should be turned to a naked right. But, if the new defendants, whether landlord or tenant, or both, after entering into the common rule, fail to appear at the trial, and to confess lease, entry, and ouster, the plaintiff, Smith, must indeed be there nonsuited, for want of proving those requisites; but judgment will in the end be entered against the casual ejector Stiles; for the condition on which Saunders, or his landlord, was admitted a defendant is broken, and therefore the plaintiff is put again in the same situation as if he never had appeared at all; the consequence of which (we have seen) would have been, that judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out Saunders, and delivered possession to Smith. The same process therefore as would have been had, provided no conditional rule had been ever made, must now be pursued as soon as the condition is broken.

The damages recovered in these actions, though formerly their only intent, are now usually (since the title has been considered as the principal question) very small and inadequate; amounting commonly to one shilling, or some other trivial sum. In order therefore to complete the remedy, when the possession has been long detained from him that had the right to it, an action of trespass also lies, after a recovery in ejectment, to recover the mesne profits which the tenant in possession has wrongfully

received. Which action may be brought in the name of either the nominal plaintiff in the ejectment, or his lessor, against the tenant in possession ; whether he be made party to the ejectment, or suffers judgment to go by default. In this case the judgment in ejectment is conclusive evidence against the defendant, for all profits which have accrued since the date of the demise stated in the former declaration of the plaintiff ; but if the plaintiff sues for any antecedent profits, the defendant may make a new defence.

Such is the modern way of obliquely bringing in question the title to lands and tenements, in order to try it in this collateral manner ; a method which is now universally adopted in almost every case. It is founded on the same principle as the ancient writs of assize, being calculated to try the mere *possessory* title to an estate ; and hath succeeded to those real actions, as being infinitely more convenient for attaining the end of justice ; because the form of the proceeding being entirely fictitious, it is wholly in the power of the court to direct the application of that fiction, so as to prevent fraud and chicane, and eviscerate the very truth of the title. The writ of ejectment and its nominal parties (as was resolved by all the judges), are “judicially to be considered as the fictitious form of an action, really brought by the lessor of the plaintiff against the tenant in possession ; invented, under the control and power of the court, for the advancement of justice in many respects ; and to force the parties to go to trial on the merits, without being entangled in the nicety of pleadings on either side.”¹

2. The writ of *quare ejecit infra terminum* lieth, by the ancient law, where the wrongdoer or ejector is not himself in possession of the lands, but another who claims under him. As where a man leaseth lands to another for years, and, after, the lessor or reversioner entereth, and maketh a feoffment in fee, or for life, of the same lands to a stranger ; now the lessee cannot bring a writ of *ejectione firmæ* or ejectment against the feoffee ; because

¹ The action of ejectment has been retained, in the modern English and American practice ; but it has been much simplified by doing away with its fictitious allegations and elements, and has thereby been rendered a more satisfactory and convenient form of remedy. It is the remedy generally made available for the trial of title to land. The method of procedure must be ascertained by referring to the statutes of the respective States.

he did not eject him, but the reversioner ; neither can he have any such action to recover his term against the reversioner who did oust him ; because he is not now in possession. And upon that account this writ was devised, upon the equity of the statute Westm. 2, ch. 24, as in a case where no adequate remedy was already provided. And the action is brought against the feoffee for deforcing, or keeping out, the original lessee, during the continuance of his term ; and herein, as in the ejectment, the plaintiff shall recover so much of the term as remains ; and also shall have actual damages for that portion of it, whereof he has been unjustly deprived. But, since the introduction of fictitious ousters, whereby the title may be tried against any tenant in possession (by what means soever he acquired it), and the subsequent recovery of damages by action of trespass for mesne profits, this action is fallen into disuse.²

CHAPTER X.

[BL. COMM.—BOOK III. CH. XII.]

Of Trespass.

IN the two preceding chapters we have considered such injuries to real property as consisted in an ouster, or amotion of the possession. Those which remain to be discussed are such as may be offered to a man's real property, without any amotion from it.

The second species, therefore, of real injuries, or wrongs that affect a man's lands, tenements, or hereditaments, is that of *trespass*. Trespass, in its largest and most extensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live ; whether it relates to a man's person, or his property. Therefore, beating another is a trespass ; for which (as we have formerly seen), an action of trespass *vi et armis* in assault and battery will lie ; taking or detaining a man's goods are respectively trespasses ; for which an action of trespass *vi et armis*, or on the case in trover and conversion, is given by

² This action was abolished by statute 3 & 4 Will. IV., ch. 27.

the law ; so also non-performance of promises or undertakings is a trespass, upon which an action of trespass on the case in *assumpsit* is grounded ; and, in general, any misfeasance, or act of one man whereby another is injuriously treated or damnified, is a transgression or trespass in its largest sense ; for which we have already seen that whenever the act itself is directly and immediately injurious to the person or property of another, and therefore necessarily accompanied with some force, an action of trespass *vi et armis* will lie ; but, if the injury is only consequential, a special action of trespass *on the case* may be brought.

But in the limited and confined sense in which we are at present to consider it, it signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of *meum* and *tuum*, or property in lands, being once established, it follows as a necessary consequence, that this right must be exclusive ; that is, that the owner may retain to himself the sole use and occupation of his soil : every entry therefore thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression. The Roman laws seem to have made a direct prohibition necessary, in order to constitute this injury ; "*qui alienum fundum ingreditur, potest a domino, si is præviderit, prohiberi ne ingrediatur.*" But the law of England, justly considering that much inconvenience may happen to the owner, before he has an opportunity to forbid the entry, has carried the point much farther, and has treated every entry upon another's lands (unless by the owner's leave, or in some very particular cases), as an injury or wrong, for satisfaction of which an action of trespass will lie ; but determines the *quantum* of that satisfaction, by considering how far the offence was wilful or inadvertent, and by estimating the value of the actual damage sustained.

Every unwarrantable entry on another's soil the law entitles a trespass *by breaking his close* : the words of the writ of trespass commanding the defendant to show cause *quare clausum querentis fregit*. For every man's land is in the eye of the law enclosed and set apart from his neighbor's : and that either by a visible and material fence, as one field is divided from another by a hedge ; or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in

the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other ; for if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, *viz.* the treading down and bruising his herbage.

One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass ; or, at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land. Thus if a meadow be divided annually among the parishioners by lot, then after each person's several portion is allotted, they may be respectively capable of maintaining an action for the breach of their several closes : for they have an exclusive interest and freehold therein for the time. But before entry and actual possession, one cannot maintain an action of trespass, though he hath the freehold in law. And therefore an heir before entry cannot have this action against an abator ; though a disseizee might have it against the disseizor, for the injury done by the disseizin itself, at which time the plaintiff was seized of the land : but he cannot have it for any act done after the disseisin, until he hath gained possession by re-entry, and then he may well maintain it for the intermediate damage done ; for after his re-entry the law, by a kind of *jus postliminii*, supposes the freehold to have all along continued in him.

A man is answerable for not only his own trespass, but that of his cattle also : for, if by his negligent keeping they stray upon the land of another (and much more if he permits, or drives them on), and they there tread down his neighbor's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages, and the law gives the party injured a double remedy in this case ; by permitting him to distrain the cattle thus *damage-feasant*, or doing damage, till the owner shall make him satisfaction : or else by leaving him to the common remedy *in foro contentioso*, by action. And the action that lies in either of these cases of trespass committed upon another's land either by a man himself or his cattle, is the action of trespass *vi et armis* : whereby a man is called upon to answer, *quare vi et armis clausum ipsius A. apud B. fregit, et blada ipsius A. ad valentiam centum solidorum ibidem nuper crescentia cum quibusdam veris depastus fuit, conculcavit, et consumpsit, &c.* for the law

always couples the idea of force with that of intrusion upon the property of another. And herein, if any unwarrantable act of the defendant or his beasts in coming upon the land be proved, it is an act of trespass for which the plaintiff must recover some damages; such however as the jury shall think proper to assess.

In trespasses of a permanent nature, where the injury is continually renewed (as by spoiling or consuming the herbage with the defendant's cattle), the declaration may allege the injury to have been committed by *continuation* from one given day to another (which is called laying the action with a *continuando*), and the plaintiff shall not be compelled to bring separate actions for every day's separate offence. But where the trespass is by one or several acts, each of which terminates in itself, and being once done cannot be done again, it cannot be laid with a *continuando*; yet if there be repeated acts of trespass committed (as cutting down a certain number of trees), they may be laid to be done, not continually, but at divers days and times within a given period.¹

In some cases trespass is justifiable; or rather entry on another's land or house shall not in those cases be accounted trespass: as if a man comes thither to demand or pay money there payable; or to execute, in a legal manner, the process of the law. Also a man may justify entering into an inn or public house, without the leave of the owner first specially asked; because when a man professes the keeping such inn or public house, he thereby gives a general license to any person to enter his doors. So a landlord may justify entering to distrain for rent; a commoner to attend his cattle, commoning on another's land; and a reversioner, to see if any waste be committed on the estate; for the apparent necessity of the thing. Also it hath been said, that by the common law and custom of England the poor are allowed to enter and glean upon another's ground after the harvest, without being guilty of trespass: which humane provision seems borrowed from the Mosaical law. But in cases where a man misdemeanors himself, or makes an ill use of the authority with which the law intrusts him, he shall be accounted a trespasser *ab initio*: as if one comes into a tavern and will not go out in a reasonable time, but tarries there all night contrary

¹ [But the latter mode prevails in modern practice, and the form of declaring with a *continuando* has grown obsolete.]

to the inclinations of the owner ; this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass. But a bare nonfeasance, as not paying for the wine he calls for, will not make him a trespasser ; for this is only a breach of contract, for which the taverner shall have an action of debt or *assumpsit* against him. But if a reversioner, who enters on pretence of seeing waste, breaks the house, or stays there all night ; or if the commoner who comes to tend his cattle, cuts down a tree ; in these and similar cases, the law judges that he entered for this unlawful purpose, and therefore, as the act which demonstrates such his purpose is a trespass, he shall be esteemed a trespasser *ab initio*.

A man may also justify in an action of trespass, on account of the freehold and right of entry being in himself ; and this defence brings the title of the estate in question. This is therefore one of the ways devised, since the disuse of real actions, to try the property of estates ; though it is not so usual as that by ejectment, because that, being now a mixed action, not only gives damages for the ejection, but also possession of the land ; whereas in trespass, which is merely a personal suit, the right can be only ascertained, but no possession delivered ; nothing being recovered but damages for the wrong committed.

CHAPTER XI.

[BL. COMM.—BOOK III. CH. XIII.]

Of Nuisance.

A THIRD species of real injuries to a man's lands and tenements, is by *nuisance*. Nuisance, *nocumentum*, or annoyance, signifies anything that worketh hurt, inconvenience, or damage. And nuisances are of two kinds : *public* or *common* nuisances, which affect the public, and are annoyance to *all* the king's subjects : for which reason we must refer them to the class of public wrongs or crimes and misdemeanors : and *private* nuisances, which are the objects of our present consideration, and may be defined, any thing done to the hurt or annoyance of the lands, tenements, or

hereditaments of another. We will therefore, first, mark out the several kinds of nuisances, and then their respective remedies.

I. In discussing the several kinds of nuisances, we will consider, first such nuisances as may affect a man's corporeal hereditaments, and then those that may damage such as are incorporeal.¹

1. First, as to *corporeal* inheritances. If a man builds a house so close to mine that his roof overhangs my roof, and throws the water off his roof upon mine, this is a nuisance, for which an action will lie. Likewise to erect a house or other building so near to mine, that it obstructs my ancient lights and windows, is a nuisance of a similar nature.† But in this latter case it is necessary that the windows be *ancient*; that is, have subsisted there a long time without interruption; otherwise there is no injury done. For he hath as much right to build a new edifice upon his ground as I have upon mine; since every man may erect what he pleases upon the upright or perpendicular of his own soil, so as, not to prejudice what has long been enjoyed by another; and it was my folly to build so near another's ground. Also if a person keeps his hogs, or other noisome animals, so near the house of another, that the stench of them incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house. A like injury is, if one's neighbor sets up and exercises an offensive trade; as a tanner's, a tallow-chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, "*sic utere tuo, ut alienum non lædas*:" this therefore is an actionable nuisance. So that the nuisances which affect a man's *dwelling* may be reduced to these three; 1. Overhanging it; which is also a species of trespass, for *cujus est solum, ejus est usque ad cælum*: 2. Stopping ancient lights: and 3. Corrupting the air with noisome smells: for light and air are two indispensable requisites to every dwelling. But depriving one of a mere matter of pleasure, as of a fine prospect by building a

¹ When an act, which would, by the rules of the common-law, be a nuisance, is authorized by act of the legislature, either expressly or by necessary implication, as *e.g.* the construction of a railroad and the running of trains, the ringing of factory bells, etc., the legislative sanction (unless unconstitutional) makes the act lawful, and persons suffering therefrom are without redress. Such an act is often called a "legalized nuisance." (136 Mass. 239; 109 U. S. 385.) But if the authority conferred be exceeded, or be improperly or negligently exercised, and a nuisance be thereby caused or other injury done, the person injured is entitled to redress. (103 N. Y. 10; 108 U. S. 317.)

† See *ante*, pp. 232 and 516.

wall, or the like : this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance.

As to nuisance to one's *lands* : if one erects a smelting-house for lead so near the land of another, that the vapor and smoke kill his corn and grass, and damage his cattle therein, this is held to be a nuisance. And by consequence it follows, that if one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance : for it is incumbent on him to find some other place to do that act, where it will be less offensive. So also, if my neighbor ought to scour a ditch, and does not, whereby my land is overflowed, this is an actionable nuisance.

With regard to *other* corporeal hereditaments : it is a nuisance to stop or divert water that uses to run to another's meadow or mill ; to corrupt or poison a water-course, by erecting a dye-house or a lime-pit for the use of trade, in the upper part of the stream ; or in short to do any act therein, that in its consequences must necessarily tend to the prejudice of one's neighbor. So closely does the law of England enforce that excellent rule of gospel morality, of "doing to others, as we would they should do unto ourselves."

2. As to *incorporeal* hereditaments, the law carries itself with the same equity. If I have a way, annexed to my estate, across another's land, and he obstructs me in the use of it, either by totally stopping it, or putting logs across it, or ploughing over it, it is a nuisance : for in the first case I cannot enjoy my right at all, and in the latter I cannot enjoy it so commodiously as I ought. Also, if I am entitled to hold a fair or market, and another person sets up a fair or market so near mine that he does me a prejudice, it is a nuisance to the freehold which I have in my market or fair. But in order to make this out to be a nuisance, it is necessary, 1. That my market or fair be the elder, otherwise the nuisance lies at my own door. 2. That the market be erected within the third part of twenty miles from mine. If a ferry is erected on a river, so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness, for the ease of all the king's subjects ; otherwise he may be grievously

amerced : it would be therefore extremely hard, if a new ferry were suffered to share his profits, which does not also share his burthen. But where the reason ceases, the law also ceases with it : therefore it is no nuisance to erect a mill so near mine, as to draw away the custom, unless the miller also intercepts the water. Neither is it a nuisance to set up any trade, or a school, in a neighborhood or rivalry with another : for by such emulation the public are like to be gainers ; and, if the new mill or school occasion a damage to the old one, it is *damnum absque injuria*.

II. Let us next attend to the remedies, which the law has given for this injury of nuisance. And here I must premise that the law gives no *private* remedy for any thing but a *private* wrong. Therefore no *action* lies for a public or common nuisance, but an *indictment* only : because the damage being common to *all* the king's subjects, no *one* can assign his particular proportion of it ; or if he could, it would be extremely hard, if every subject in the kingdom were allowed to harass the offender with separate actions. For this reason, no person, natural or corporate, can have an action for a public nuisance, or punish it ; but only the king in his public capacity of supreme governor, and *pater familias* of the kingdom. Yet this rule admits of one exception ; where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance ; in which case he shall have a private satisfaction by action.² As if, by means of a ditch dug across the public way, which is a common nuisance, a man or his horse suffer any injury by falling therein ; there for this particular damage, which is not common to others, the party shall have his action. Also if a man hath abated, or removed, a nuisance which offended him (as we may remember it was stated in the first chapter of this book, that the party injured hath a right to do), in this case he is entitled to no action.³ For he had choice of two remedies ; either without suit, by abating it himself, by his own mere act and authority ; or by suit, in which he may both recover damages,

² See *Brayton v. Fall River*, 113 Mass. 218 ; *Francis v. Schoellkopf*, 53 N. Y. 152 ; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44 ; *Miss. &c. R. Co. v. Ward*, 2 Black (U. S.), 485.

³ But it is now held that although a nuisance be abated, the abator may maintain an action to recover for damages sustained previous to the abatement. (*Pierce v. Dart*, 7 Cow. 609 ; *Lansing v. Smith*, 4 Wend. 9.)

and remove it by the aid of the law : but, having made his election of one remedy, he is totally precluded from the other.

The remedies by suit are, 1. By action *on the case* for damages ; in which the party injured shall only recover a satisfaction for the injury sustained ; but cannot thereby remove the nuisance. Indeed every continuance of a nuisance is held to be a fresh one ; and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it. Yet the founders of the law of England did not rely upon probabilities merely, in order to give relief to the injured. They have therefore provided two other actions ; the *assize of nuisance*, and the writ of *quod permittat prosternere* : which not only give the plaintiff satisfaction for his injury past, but also strike at the root and remove the cause itself, the nuisance that occasioned the injury. These two actions however can only be brought by the tenant of the freehold ; so that a lessee for years is confined to his action upon the case.⁴

2. An *assize of nuisance* is a writ : wherein it is stated that the party injured complains of some particular fact done, *ad nocumentum liberi tenementi sui*, and therefore commanding the sheriff to summon an assize, that is a jury, and view the premises, and have them at the next commission of assizes, that justice may be done therein : and, if the assize is found for the plaintiff, he shall have judgment of two things : 1. To have the nuisance abated ; and, 2. To recover damages.

3. The *quod permittat prosternere*, is in the nature of a writ of right. This is a writ commanding the defendant to permit the plaintiff to abate, *quod permittat prosternere*, the nuisance complained of ; and unless he so permits, to summon him to appear in court, and show cause why he will not. And the plaintiff shall have judgment herein to abate the nuisance, and to recover damages against the defendant.

Both these actions, of *assize of nuisance*, and of *quod permittat*

⁴ Both these actions were abolished by statute 3 & 4 Will. IV., ch. 27. They have also been generally abolished in the United States, and an action on the case for damages is employed in their stead. But, in some States, special statutory remedies have been provided in conjunction with the action on the case. The equitable remedy of injunction is frequently employed as a mode of preventing the continuance of a nuisance.

prosterne are now out of use, and have given way to the action on the case; in which, as was before observed, no judgment can be had to abate the nuisance, but only to recover damages.

CHAPTER XII.

[BL. COMM.—BOOK III. CH. XIV.]

Of Waste.

THE fourth species of injury, that may be offered to one's real property is by *waste*, or destruction in lands and tenements. What shall be called waste was considered at large in a former book, as it was a means of forfeiture and thereby of transferring the property of real estates. I shall therefore here only beg leave to remind the student, that waste is a spoil and destruction of the estate, either in houses, woods, or lands; by demolishing not the temporary profits only, but the very substance of the thing, thereby rendering it wild and desolate; which the common law expresses very significantly by the word *vastum*: and that this *vastum*, or waste, is either voluntary, or permissive; the one by an actual and designed demolition of the lands, woods, and houses; the other arising from mere negligence, and want of sufficient care in reparations, fences, and the like. So that my only business is at present to show, to whom this waste is an injury; and of course who is entitled to any, and what, remedy by action.

I. The persons who may be injured by waste, are such as have some *interest* in the estate wasted; for if a man be the absolute tenant in fee-simple, without any incumbrance or charge on the premises, he may commit whatever waste his own indiscretion may prompt him to, without being impeachable, or accountable for it to any one. And, though his heir is sure to be the sufferer, yet *nemo est hæres viventis*; no man is certain of succeeding him, as well on account of the uncertainty which shall die first, as also because he has it in his power to constitute what heir he pleases, according to the civil law notion of an *hæres natus* and an *hæres factus*: or, in the more accurate phrase

ology of our English law, he may aliene, or devise his estate to whomever he thinks proper, and by such alienation or devise may disinherit his heir at law. Into whose hands soever therefore the estate wasted comes, after a tenant in fee-simple, though the waste is undoubtedly *damnum*, it is *damnum absque injuria*.

One species of interest, which is injured by waste, is that of a person who has a right of common in the place wasted; especially if it be common of *estovers*, or a right of cutting and carrying away wood for house-bote, plough-bote, &c. Here, if the owner of the wood demolishes the whole wood, and thereby destroys all possibility of taking estovers, this is an injury to the commoner, amounting to no less than a disseizin of his common of estovers, if he chooses so to consider it; for which he has his remedy to recover possession and damages by assize, if entitled to a freehold in such common; but if he has only a chattel interest, then he can only recover damages by an action on the case for this waste and destruction of the woods, out of which his estovers were to issue.

But the most usual and important interest, that is hurt by this commission of waste, is that of him who hath the remainder or reversion of the *inheritance*, after a particular estate for life or years in being. Here, if the particular tenant (be it the tenant in dower or by curtesy, who was answerable for waste at the common law), or the lessee for life or years, who was first made liable by the statutes of Marlbridge and of Gloucester, if the particular tenant, I say, commits or suffers any waste, it is a manifest injury to him that has the inheritance, as it tends to mangle and dismember it of its most desirable incidents and ornaments, among which timber and houses may justly be reckoned the principal. To him therefore in remainder and reversion, to whom the *inheritance* appertains in expectancy, the law hath given an adequate remedy. For he, who hath the remainder *for life* only, is not entitled to sue for waste; since his interest may never perhaps come into possession, and then he hath suffered no injury.

II. The redress for this injury of waste is of two kinds; preventive, and corrective: the former of which is by writ of *estrepement*, the latter by that of *waste*.¹

¹ Both these writs have been abolished in England, and generally in the United States; and an action on the case for damages is used in their

1. Estrepement is an old French word, signifying the same as waste or extirpation: and the writ of *estrepement* lay at the common law, *after* judgment obtained in any action real, and before possession was delivered by the sheriff; to stop any waste which the vanquished party might be tempted to commit in lands, which were determined to be no longer his. But as in some cases the demandant may be justly apprehensive, that the tenant may make waste or *estrepement* pending the suit, well knowing the weakness of his title, therefore the statute of Gloucester gave another writ of *estrepement, pendente placito*, commanding the sheriff firmly to inhibit the tenant "*ne faciat vastum vel estrepementum pendente placito dicto indiscusso.*" And, by virtue of either of these writs the sheriff may resist them that do, or offer to do waste; and, if otherwise he cannot prevent them, he may lawfully imprison the wasters, or make a warrant to others to imprison them: or, if necessity require, he may take the *posse comitatus* to his assistance. So odious in the sight of the law is waste and destruction.

Besides this preventive redress at common law, the courts of equity, upon bill exhibited therein, complaining of waste and destruction, will grant an injunction in order to stay waste, until the defendant shall have put in his answer, and the court shall thereupon make further order. Which is now become the most usual way of preventing waste.

2. A writ of *waste* is also an action, partly founded upon the common law, and partly upon the statute of Gloucester; and may be brought by him who hath the immediate estate of inheritance in reversion or remainder, against the tenant for life, tenant in dower, tenant by curtesy, or tenant for years. This action is also maintainable in pursuance of statute Westm. 2, by one tenant in common of the inheritance against another, who makes waste in the estate holden in common. But these tenants in common and joint-tenants are not liable to the penalties of the statute of Gloucester, which extends only to such as have life-estates, and do waste to the prejudice of the inheritance. The waste however must be something considerable; for if it amount
stead. This is more comprehensive in its scope than the former action of waste, since it may be brought by a reversioner or remainder-man for life or years. An injunction may also, in many instances, be obtained in equity as a preventive remedy. (See *ante*, page 304, note 1.) The writ of *estrepement* is still in use in Pennsylvania. (122 Pa. St. 78.)

only to twelve pence, or some such petty sum, the plaintiff shall not recover in an action of waste : *nam de minimis non curat lex.*

This action of waste is a mixed action ; partly real, so far as it recovers land ; and partly personal, so far as it recovers damages. For it is brought for both those purposes ; and, if the waste be proved, the plaintiff shall recover the thing or place wasted, and also treble damages by the statute of Gloucester. The writ of waste calls upon the tenant to appear and show cause why he hath committed waste and destruction in the place named, *ad exhæredationem*, to the disinherison, of the plaintiff. The defendant, on the trial, may give in evidence anything that proves there was no waste committed, as that the destruction happened by lightning, tempest, the king's enemies, or other inevitable accident. But it is no defence to say, that a stranger did the waste, for against him the plaintiff hath no remedy : though the defendant is entitled to sue such stranger in an action of trespass *vi et armis*, and shall recover the damages he has suffered in consequence of such unlawful act.

When the waste and damages are ascertained, either by confession, verdict, or inquiry of the sheriff, judgment is given in pursuance of the statute of Gloucester, ch. 5, that the plaintiff shall recover the place wasted ; for which he has immediately a writ of *seizin*, provided the particular estate be still subsisting (for, if it be expired, there can be no forfeiture of the land), and also that the plaintiff shall recover treble the damages assessed by the jury, which he must obtain in the same manner as all other damages, in actions personal and mixed, are obtained, whether the particular estate be expired, or still in being.

CHAPTER XIII.

[BL. COMM. —BOOK III. CH. XVII.]

Of Injuries Proceeding from, or affecting the Crown, or State.

HAVING in the preceding chapters considered the injuries, or private wrongs, that may be offered by one subject to another, all of which are redressed by the command and authority of the king, signified by his original writs returnable in the several courts of justice, which thence derive a jurisdiction of examining and determining the complaint; I proceed now to inquire into the mode of redressing those injuries to which the crown itself is a party. We will consider first, the manner of redressing those wrongs or injuries which a subject may suffer from the crown, and then of redressing those which the crown may receive from a subject.

I. That the king can do no wrong, is a necessary and fundamental principle of the English constitution. Whenever therefore it happens, that, by misinformation, or inadvertence, the crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign (for who shall command the king?) yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute: and, as it presumes that to *know of* any injury and to *redress* it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.

The distance between the sovereign and his subjects is such, that it rarely can happen that any *personal* injury can immediately and directly proceed from the prince to any private man; and, as it can so seldom happen, the law in decency supposes that it never will or can happen at all. But injuries to the rights of *property* can scarcely be committed by the crown without the intervention of its officers; for whom the law in matters of right entertains no respect or delicacy, but furnishes various methods

of detecting the errors or misconduct of those agents, by whom the king has been deceived, and induced to do a temporary injustice.

The common law methods of obtaining possession or restitution from the crown, of either real or personal property, are, 1. By *petition de droit*, or petition of right : which is said to owe its original to King Edward the First. 2. By *monstrans de droit*, manifestation or plea of right : both of which may be preferred or prosecuted either in the chancery or exchequer. The former is of use, where the king is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself ; in which case he must be careful to state truly the whole title of the crown, otherwise the petition shall abate : and then, upon this answer being endorsed or underwritten by the king, *soit droit fait al partie* (let right be done to the party), a commission shall issue to inquire of the truth of this suggestion : after the return of which the king's attorney is at liberty to plead in bar ; and the merits shall be determined upon issue or demurrer, as in suits between subject and subject. But where the right of the party, as well as the right of the crown, appears upon record, there the party shall have *monstrans de droit*, which is putting in a claim of right grounded on facts already acknowledged and established, and praying the judgment of the court, whether upon those facts the king or the subject hath the right.¹ But as this seldom happens, and the remedy by *petition* was extremely tedious and expensive, that by *monstrans*

¹ These peculiar remedies are confined to English practice, and have no application in the United States. An individual must seek redress from the State by action at law, or by application to the legislature. It is a general principle, that a sovereignty cannot be sued in its own courts, unless special provision has been made by constitution or by legislative enactment for the maintenance of such suits. The right to bring action against the State must, therefore, be founded upon its own permission. Such actions are expressly sanctioned in a number of the States, but the right extends no further than the statutes expressly warrant. In cases beyond the scope of their provisions, a remedy must be sought from the legislature. Controversies between different States may be adjudicated upon in the United States Courts ; but it is expressly provided by the Constitution that the judicial power of these courts shall not extend to suits prosecuted against one of the States by citizens of another State or by citizens or subjects of any foreign State. (11th Am't. See *Windsor &c. R. Co. v. Queen &c. R. Co.*, 11 App. Cas. 607 ; *People v. Dennison*, 84 N. Y. 272.)

was much enlarged, and rendered almost universal by several statutes.

II. The methods of redressing such injuries as the crown may receive from the subject are :—

1. By such usual common law actions, as are consistent with the royal prerogative and dignity. As therefore the king, by reason of his legal ubiquity, cannot be disseized or dispossessed of any real property which is once vested in him, he can maintain no action which supposes a dispossession of the plaintiff; such as an assize or an ejectment: but he may bring an action for trespass for taking away his goods; but such actions are not usual (though in strictness maintainable) for breaking his close, or other injury done upon his soil or possession. It would be equally tedious and difficult, to run through every minute distinction that might be gleaned from our ancient books with regard to this matter; nor is it in any degree necessary, as much easier and more effectual remedies are usually obtained by such prerogative modes of process, as are peculiarly confined to the crown.

2. Such as that of *inquisition* or *inquest of office*: which is an inquiry made by the king's officer, his sheriff, coroner, or escheator, *virtute officii*, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels. This is done by a jury of no determinate number; being either twelve, or less, or more. As, to inquire, whether the king's tenant for life died seized, whereby the reversion accrues to the king: whether A., who held immediately of the crown, died without heirs; in which case the lands belong to the king by escheat: whether B. be attainted of treason; whereby his estate is forfeited to the crown: whether C., who has purchased lands, be an alien; which is another cause of forfeiture: whether D. be an idiot *a nativitate*; and therefore, together with his lands, appertains to the custody of the king; and other questions of like import, concerning both the circumstances of the tenant, and the value or identity of the lands. These inquests of office were more frequently in practice than at present, during the continuance of the military tenures amongst us: when, upon the death of every one of the king's tenants, an inquest of office was held, called an *inquisitio post mortem*, to inquire of what lands he died seized, who was his heir, and of what age, in order to entitle

the king to his marriage, wardship, relief, *primer seizin*, or other advantages, as the circumstances of the case might turn out.

With regard to other matters the inquests of office still remain in force, and are taken upon proper occasions; being extended not only to lands, but also to goods and chattels personal, as in the case of wreck, treasure-trove, and the like; and especially as to forfeitures for offences. For every jury which tries a man for treason or felony, every coroner's inquest that sits upon a *felo de se*, or one killed by chance-medley, is not only with regard to chattels, but also as to real interests, in all respects an inquest of office: and if they find the treason or felony, or even the flight of the party accused (though innocent), the king is thereupon, by virtue of this *office found*, entitled to have his forfeitures; and also, in the case of chance-medley, he or his grantees are entitled to such things by way of deodand, as have moved to the death of the party.

These inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record; without which he in general can neither take, nor part from any thing. For it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seize any man's possessions upon bare surmises without the intervention of a jury.

With regard to real property, if an office be found for the king, it puts him in immediate possession, without the trouble of a formal entry, provided a subject in the like case would have had a right to enter; and the king shall receive all the mesne or intermediate profits from the time that his title accrued. As, on the other hand, by the *articuli super cartas*, if the king's escheator or sheriff seize lands into the king's hand without cause, upon taking them out of the king's hand again, the party shall have the mesne profits restored to him.¹

3. Where the crown hath unadvisedly granted anything by

¹ "Inquest of office," is a common remedy in the United States, applicable to cases where real property is forfeited to the State. It is most commonly employed when lands escheat to the State for want of heirs. In some States, moreover, the common-law disabilities of aliens in regard to the holding of property acquired by purchase have not been removed, and this form of procedure is resorted to to secure a forfeiture of the lands to the State. But, in a number of the States, aliens have been empowered to hold lands by an indefeasible title. (See *ante*, page 119, note 2.)

letters-patent, which ought not to be granted, or where the patentee hath done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent is by writ of *scire facias* in chancery. This may be brought either on the part of the king in order to resume the thing granted ; or, if the grant be injurious to a subject, the king is bound of right to permit him (upon his petition) to use his royal name for repealing the patent in a *scire facias*. And so also, if upon office untruly found for the king, he grants the land over to another, he who is grieved thereby, and traverses the office itself, is entitled before issue joined to a *scire facias* against the patentee, in order to avoid the grant.

4. An *information* on behalf of the crown, filed in the exchequer by the king's attorney-general, is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for any personal wrong committed in the lands or other possessions of the crown. It differs from an information filed in the court of king's bench, of which we shall treat in the next book ; in that *this* is instituted to redress a private wrong, by which the property of the crown is affected ; *that* is calculated to punish some public wrong, or heinous misdemeanor in the defendant. It is grounded on no writ under seal, but merely on the intimation of the king's officer, the attorney-general, who "gives the court to understand and be informed of" the matter in question : upon which the party is put to answer, and trial is had, as in suits between subject and subject. The most usual informations are those of *intrusion* and *debt* : *intrusion*, for any trespass committed on the lands of the crown, as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, or the like ; and *debt*, upon any contract for monies due to the king, or for any forfeiture due to the crown upon the breach of a penal statute. This is most commonly used to recover forfeitures occasioned by transgressing those laws, which are enacted for the establishment and support of the revenue ; others, which regard mere matters of police and public convenience, being usually left to be enforced by common informers, in the *qui tam* informations or actions, of which we have formerly spoken. But after the attorney-general has informed upon the breach of a penal law, no other information can be received. There is also an information *in rem*, when

any goods are supposed to become the property of the crown, and no man appears to claim them, or to dispute the title of the king. As anciently in the case of treasure-trove, wrecks, waifs, and estrays, seized by the king's officer for his use.

5. A writ of *quo warranto* is in the nature of a writ of right for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right. It lies also in case of non-user or long neglect of a franchise, or misuser or abuse of it; being a writ commanding the defendant to show by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. This was originally returnable before the king's justices at Westminster; but afterwards only before the justices in eyre, by virtue of the statutes of *quo warranto*, 6 Edw. I., ch. 1, and 18 Edw. I., st. 2; but since those justices have given place to the king's temporary commissioners of assize, the judges on the several circuits, this branch of the statutes hath lost its effect; and writs of *quo warranto* (if brought at all) must now be prosecuted and determined before the king's justices at Westminster. And in case of judgment for the defendant, he shall have an allowance of his franchise; but in case of judgment for the king, for that the party is entitled to no such franchise, or hath disused or abused it, the franchise is either seized into the king's hands, to be granted out again to whomever he shall please; or, if it be not such a franchise as may subsist in the hands of the crown, there is merely judgment of *ouster*, to turn out the party who usurped it.

The judgment on a writ of *quo warranto* (being in the nature of a writ of right) is final and conclusive even against the crown. Which, together with the length of its process, probably occasioned that disuse into which it is now fallen, and introduced a more modern method of prosecution, by *information* filed in the court of king's bench by the attorney-general, in the nature of a writ of *quo warranto*; wherein the process is speedier, and the judgment not quite so decisive. This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seize it for the crown; but hath long been applied to the mere purposes of trying the civil right, seizing the franchise or ousting the wrongful possessor; the fine being nominal only.

This proceeding is however now applied to the decision of corporation disputes between party and party, by virtue of the statute 9 Ann., ch. 20, which permits an information in nature of *quo warranto* to be brought with leave of the court, at the relation of any person desiring to prosecute the same (who is then styled the *relator*), against any person usurping, intruding into, or unlawfully holding any franchise or office in any city, borough, or town corporate; provides for its speedy determination; and directs that, if the defendant be convicted, judgment of ouster (as well as a fine) may be given against him, and that the relator shall pay or receive costs according to the event of the suit.³

6. The writ of *mandamus* is also made by the same statute 9 Ann., ch. 20, a most full and effectual remedy, in the first place, for refusal of admission where a person is entitled to an office or place in any such corporation; and, secondly, for wrongful removal, when a person is legally possessed. These are injuries, for which, though redress for the party interested may be had by assize, or other means, yet as the franchises concern the public, and may affect the administration of justice, this prerogative writ also issues from the court of king's bench; commanding, upon good cause shown to the court, the party complaining to be admitted or restored to his office. And the statute requires, that a return be immediately made to the first writ of *mandamus*: which return may be pleaded to or traversed by the prosecutor, and his antagonist may reply, take issue, or demur, and the same proceedings may be had, as if an action on the case had been brought, for making a false return: and, after judgment obtained

³ An information is most commonly used as a civil remedy in this proceeding, known as an "information in the nature of a *quo warranto*." This proceeding is still in use in many of the United States, and has substantially the same scope of application as in the English practice. Thus, it may be brought against an unincorporated society for the unauthorized exercise of corporate powers; against a duly organized corporation for non-user, or misuse of its franchises or powers, or for a violation of its charter; or against any person for a usurpation of, or intrusion into, a public office; or the unauthorized exercise of official powers, etc. The suit is commonly instituted by the attorney-general of the State of his own authority, or by a private prosecutor or "relator," who uses the name of the attorney-general in the proceeding as a matter of form. It is usually required that the leave of the court be obtained in those cases, as in England. In New York, and several other States, this proceeding has been abolished; but a very similar form of remedy by action has been substituted in its place.

for the prosecutor, he shall have a peremptory writ of *mandamus* to compel his admission or restitution; which latter (in case of an action) is effected by a writ of restitution. So that now the writ of *mandamus*, in cases within this statute, is in the nature of an action: whereupon the party applying and succeeding may be entitled to costs, in case it be the franchise of a citizen, burgess, or freeman; and also, in general, a writ of error may be had thereupon.⁴

CHAPTER XIV.

[BL. COMM.—BOOK III. CH. XVIII.]

Of the Pursuit of Remedies by Action; and first, of the Original Writ.

HAVING, under the head of *redress by suit in courts*, pointed out in the preceding pages, in the first place, the *nature* and several *species* of courts of justice, wherein remedies are administered for all sorts of private wrongs; and, in the second place, shown to which of these courts in particular application must be made for redress, according to the distinction of injuries, or, in other words, what wrongs are *cognizable* by one court, and what by another; I proceeded, under the title of *injuries cognizable by the courts of common law*, to define and explain the specific remedies by action, provided for every possible degree of wrong or injury; as well such remedies as are dormant and out of use, as those which are in every day's practice, apprehending that the reason of the one could never be clearly comprehended without some acquaintance with the other: and, I am now, in the last place, to examine the *manner* in which these several remedies are *pursued* and applied, by action in the courts of common law; to which I shall afterwards subjoin a brief account of the proceedings in courts of equity.¹

⁴ See *ante*, page 670, note 3.

¹ The remaining chapters in this book, with the exception of the last, treat of the system of practice and pleading in actions at law, which was in force in England when these Commentaries were written, but which has been in part superseded, and in part essentially modified by subsequent enactments. In 1852, an act was passed, known as the "Common-Law Procedure Act," by which the methods of procedure were much simplified and improved, and

In treating of remedies by action at common-law, I shall confine myself to the *modern* method of practice in our courts of judicature.

What therefore the student may expect in this and the succeeding chapters, is an account of the method of proceeding in and prosecuting a suit upon any of the personal writs we have before spoken of, in the court of *common pleas* at Westminster, that being the court originally constituted for the prosecution of all civil actions. But in giving an abstract or history of the progress of a suit through the court of common pleas, we shall at the same time give a general account of the proceedings of the other two courts [the courts of king's bench and exchequer]; taking notice, however, of any considerable difference in the local practice of each. And the same abstract will moreover afford us some general idea of the conduct of a cause in the inferior courts of common law.

The most natural and perspicuous way of considering the subject before us will be (I apprehend) to pursue it in the order and method wherein the proceedings themselves follow each

the practice of the different courts reduced to substantial uniformity; and within the last few years, further changes of great importance have been made by the Supreme Court of Judicature Act. But it has been deemed most advisable to retain in the present edition the original text of Blackstone (with some omissions), rather than to substitute a synopsis of the present English practice. For the present English system is subject constantly to statutory changes, and differs in many respects from the methods of procedure in force in the States of this country. The ancient English practice was the basis upon which the procedure of the American States was originally founded; and may, therefore, be reasonably considered of more value to the American student, than that which has since been introduced in England in its stead. It is true that, in the various States, important changes have been made in the early systems of legal procedure, so that now there is no little diversity in this respect; but a statement of the methods of practice, in which there was formerly essential uniformity in the different States, will be of more practical value to students in different parts of this country, than an account of the present practice of any particular State. There is such a general correspondence between all systems of practice, that every student will find Blackstone's account of the principal rules of practice and pleading of much importance as an introduction to the study of the procedure in his own State. Nothing further, therefore, will be attempted in the annotations upon the succeeding chapters, than to point out the most important changes that have been made in the system of procedure, and to show what features of this early practice were not introduced into American law.

other ; rather than to distract and subdivide it by any more logical analysis. The general therefore and orderly parts of a suit are these : 1. The original writ ; 2. The process ; 3. The pleadings ; 4. The issue or demurrer ; 5. The trial ; 6. The judgment, and its incidents ; 7. The proceedings in nature of appeals ; 8. The execution.

First, then, of the *original*, or original writ ; which is the beginning or foundation of the suit.² When a person hath received an injury, and thinks it worth his while to demand a satisfaction for it, he is to consider with himself, or take advice, what redress the law has given for that injury ; and thereupon is to make application or suit to the crown, the fountain of all justice, for that particular specific remedy which he is determined or advised to pursue. As, for money due on bond, an action of *debt* ; for goods detained without force, an action of *detinue* or *trover* ; or, if taken with force, an action of *trespass vi et armis* ; or to try the title of lands, a *writ of entry* or action of trespass in *ejectment* ; or for any consequential injury received, a special action *on the case*. To this end he is to sue out, or purchase by paying the stated fees, an *original*, or original writ, from the court of chancery, which is the *officina justitiæ*, the shop or mint of justice, wherein all the king's writs are framed. It is a mandatory letter from the king in parchment, sealed with his great seal, and directed to the sheriff of the county wherein the injury is committed or supposed so to be, requiring him to command the wrongdoer or party accused, either to do justice to the complainant, or else to appear in court and answer the accusation against him. Whatever the sheriff does in pursuance of this writ, he must *return* or certify to the court of common pleas, together with the writ itself : which is the foundation of the jurisdiction of that court, being the king's warrant for the judges to proceed to the determination of the cause.

² The use of the "original writ," as the mode of commencing a suit in personal actions, was abolished by statute 2 Will. IV., ch. 39, and the practice in the different courts of law rendered uniform. It was provided that actions should be commenced by the service of a summons upon the defendant ; and by subsequent statutes, the same method has been retained, with some extension of its application. In the United States, the use of the "original writ" was early discarded, and more convenient methods of beginning suits substituted in its stead. The most common mode adopted was a writ of "summons," as in England.

The day, on which the defendant is ordered to appear in court, and on which the sheriff is to bring in the writ and report how far he has obeyed it, is called the *return* of the writ ; it being then returned by him to the king's justices at Westminster. And it is always made returnable at the distance of at least fifteen days from the date or *teste*, that the defendant may have time to come up to Westminster, even from the most remote parts of the kingdom ; and upon some day in one of the four *terms*, in which the court sits for the despatch of business.

These terms are supposed by Mr. Selden to have been instituted by William the Conqueror : but Sir Henry Spelman hath clearly and learnedly shown, that they were gradually formed from the canonical constitutions of the church : being indeed no other than those leisure seasons of the year, which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business. Throughout all Christendom, in very early times, the whole year was one continual term for hearing and deciding causes. For the Christian magistrates, to distinguish themselves from the heathens, who were extremely superstitious in the observation of their *dies fasti et nefasti*, went into a contrary extreme, and administered justice upon all days alike. Till at length the church interposed and exempted certain holy seasons from being profaned by the tumult of forensic litigations. As, particularly, the time of Advent and Christmas, which gave rise to the winter vacation ; the time of Lent and Easter, which created that in the spring ; the time of Pentecost, which produced the third ; and the long vacation, between Midsummer and Michaelmas, which was allowed for the hay-time and harvest. All Sundays also, and some particular festivals, as the days of the Purification, Ascension, and some others, were included in the same prohibition : which was established by a canon of the church, A. D. 517, and was fortified by an imperial constitution of the younger Theodosius, comprised in the Theodosian Code.

Afterwards, when our own legal constitution came to be settled, the commencement and duration of our law terms were appointed with an eye to those canonical prohibitions ; and it was ordered by the laws of King Edward the Confessor, that from Advent to the octave of the Epiphany, from *Septuagesima* to the octave of Easter, from the Ascension to the octave of Pentecost,

and from three in the afternoon of all Saturdays till Monday morning, the peace of God and of holy church shall be kept throughout all the kingdom. The portions of time, that were not included within these prohibited seasons, fell naturally into a four-fold division, and, from some festival day that immediately preceded their commencement, were denominated the terms of St. Hilary, of Easter, of the holy Trinity, and of St. Michael: which terms have been since regulated and abbreviated by several acts of parliament.

There are in each of these terms stated days called *days in bank*, *dies in banco*; that is, days of appearance in the court of common bench. They are generally at the distance of about a week from each other, and have reference to some festival of the church. On some one of these days in bank all original writs must be made returnable; and therefore they are generally called the *returns* of that term. The first return in every term is, properly speaking, the first day in that term. And thereon the court sits to take *essoigns*, or excuses, for such as do not appear according to the summons of the writ: wherefore this is usually called the *essoign day* of the term. But on every return-day in the term, the person summoned has three days of grace, beyond the day named in the writ, in which to make his appearance; and if he appears on the fourth day inclusive, *quarto die post*, it is sufficient. For our sturdy ancestors held it beneath the condition of a freeman to appear, or to do any other act, at the precise time appointed.

Therefore, at the beginning of each term, the court does not usually sit for dispatch of business till the *fourth* or *appearance* day; and the court also sits till the *quarto die post* or appearance day of the last return, which is therefore the end of each of them.³

³ A word may here be said as to the procedure of the United States Courts. It is provided by Act of Congress that the "practice, pleadings, and forms and modes of proceeding in civil causes (other than equity and admiralty causes) in the Circuit and District Courts shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held." (*Amy v. Watertown*, 130 U. S. 301.) So the same remedies by attachment, execution, or other process may be availed of in these federal courts in common-law causes as are provided in like causes by the laws of the State in which such courts are held. (U. S. Rev. St. §§ 914-916.) As to the practice in equity cases, see *post*, p. 843, note 3.

CHAPTER XV.

[BL. COMM.—BOOK III. CH. XIX.]

Of Process.

THE next step for carrying on the suit, after suing out the original, is called the *process*; being the means of compelling the defendant to appear in court. This is sometimes called *original process*, being founded upon the original writ; and also to distinguish it from *mesne* or intermediate process, which issues, pending the suit, upon some collateral interlocutory matter; as to summon juries, witnesses, and the like. *Mesne process* is also sometimes put in contradistinction to *final process* or *process of execution*; and then it signifies all such process as intervenes between the beginning and end of a suit.

But process, as we are now to consider it, is the method taken by the law to compel a compliance with the original writ, of which the primary step is by giving the party notice to obey it. This notice is given upon all real *præcipes*, and also upon all personal writs for injuries not against the peace, by *summons*; which is a warning to appear in court at the return of the original writ, given to the defendant by two of the sheriff's messengers called *summoners*, either in person, or left at his house or land. This warning on the land is given, in real actions, by erecting a white stick or wand on the defendant's grounds, and by statute 31 Eliz., ch. 3, the notice must also be proclaimed on some Sunday before the door of the parish church.

If the defendant disobeys this verbal monition, the next process is by writ of *attachment* or *pone*, so called from the words of the writ, "*pone per vadium et salvos plegios*, put by gage and safe pledges A. B. the defendant, &c." This is a writ not issuing out of chancery, but out of the court of common pleas, being grounded on the non-appearance of the defendant at the return of the original writ; and thereby the sheriff is commanded to attach him, by taking *gage*, that is, certain of his goods, which he shall forfeit if he doth not appear; or by making him find

safe pledges or sureties who shall be amerced in case of his non-appearance. This is also the first and immediate process, without any previous summons, upon actions of trespass *vi et armis*, or for other injuries, which though not forcible are yet trespasses against the peace, as *deceit* and *conspiracy*; where the violence of the wrong requires a more speedy remedy, and therefore the original writ commands the defendant to be at once attached, without any precedent warning.¹

If, after *attachment*, the defendant neglects to appear, he not only forfeits this security, but is moreover to be farther compelled by writ of *distringas*, or *distress infinite*; which is a subsequent process issuing from the court of common pleas, commanding the sheriff to distrain the defendant from time to time, and continually afterwards, by taking his goods and the profits of lands, which are called *issues*, and which by the common law he forfeits to the king if he doth not appear. But now the issues may be sold, if the court shall so direct, in order to defray the reasonable cost of the plaintiff.

And here by the common law the process ended in case of injuries without force: the defendant, if he had any substance, being gradually stripped of it all by repeated distresses, till he rendered obedience to the king's writ; and, if he had no substance, the law held him incapable of making satisfaction, and therefore looked upon all further process as nugatory. And besides, upon feudal principles, the person of a feudatory was not liable to be attached for injuries merely civil, lest thereby his lord should be deprived of his personal services. But, in case of injury accompanied with force, the law, to punish the breach of the peace, and prevent its disturbance for the future, provided also a process against the defendant's *person*, in case he neglected to appear upon the former process of attachment, or had no substance whereby to be attached; subjecting his body to imprisonment by the writ of *capias ad respondendum*. But this immunity of the defendant's person, in case of peaceable though fraudulent injuries, producing great contempt of the law in indigent wrongdoers, a *capias* was also allowed to arrest the person, in actions of *account*, though no breach of the peace be suggested, by the statutes of Marlbridge, 52 Hen. III., ch. 23,

¹ As to the changes subsequently introduced in the method of commencing actions, see note 2, preceding chapter.

and Westm. 2, 13 Edw. I., ch. 11, in actions of *debt* and *detinue*, by statute 25 Edw. III., ch. 17, and in all actions *on the case*, by statute 19 Hen. VII., ch. 9. Before which last statute a practice had been introduced of commencing the suit by bringing an original writ of trespass *quare clausum fregit*, for breaking the plaintiff's close *vi et armis*; which by the old common law subjected the defendant's person to be arrested by writ of *capias*: and then afterwards, by connivance of the court, the plaintiff might proceed to prosecute for any other less forcible injury. This practice (through custom rather than necessity, and for saving some trouble and expense, in suing out a special original adapted to the particular injury) still continues in almost all cases, except in actions of debt; though now, by virtue of the statutes above cited and others, a *capias* might be had upon almost every species of complaint.

If therefore the defendant being summoned or attached makes default, and neglects to appear; or if the sheriff returns a *nihil*, or that the defendant hath nothing whereby he may be summoned, attached, or distrained; the *capias* now usually issues: being a writ commanding the sheriff to *take* the body of the defendant if he may be found in his bailiwick or county, and him safely to keep, so that he may have him in court on the day of the return, to answer to the plaintiff of a plea of debt or trespass, &c., as the case may be. This writ, and all others subsequent to the original writ, not issuing out of chancery but from the court into which the original was returnable, and being grounded on what has passed in that court in consequence of the sheriff's return, are called *judicial*, not *original* writs; they issue under the private seal of that court, and not under the great seal of England; and are *tested*, not in the king's name, but in that of the chief (or, if there be no chief, of the senior) justice only. And these several writs being grounded on the sheriff's return, must respectively bear date the same day on which the writ immediately preceding was returnable.²

² Arrest upon mesne process is common in American practice, but is not so extended in its range of application as formerly at common law; being generally confined to particular classes of cases, specifically enumerated by statute. The object of the arrest is to ensure the appearance of the defendant, and to prevent his avoidance of the jurisdiction and authority of the court. The usual grounds upon which arrest is declared permissible in the several States are—the non-residence of the defendant, or his anticipated re-

This is the regular and ordinary method of process. But it is now usual in practice, to sue out the *capias* in the first instance, upon a supposed return of the sheriff; especially if it be suspected that the defendant, upon notice of the action, will abscond; and afterwards a fictitious original is drawn up, if the party is called upon so to do, with a proper return thereupon, in order to give the proceedings a color of regularity. When this *capias* is delivered to the sheriff, he by his under-sheriff grants a warrant to his inferior officers or bailiffs, to execute it on the defendant. And, if the sheriff of Oxfordshire (in which county the injury is supposed to have been committed and the action is laid) cannot find the defendant in his jurisdiction, he returns that he is not found, *non est inventus*, in his bailiwick: whereupon another writ issues, called a *testatum capias*, directed to the sheriff of the county where the defendant is supposed to reside, as of Berkshire, reciting the former writ, and that it is *testified, testatum est*, that the defendant lurks or wanders in *his* bailiwick, wherefore he is commanded to take him, as in the former *capias*. But here also, when the action is brought in one county, and the defendant lives in another, it is usual, for saving trouble, time, and expense, to make out a *testatum capias* at the first; supposing not only an original, but also a former *capias*, to have been granted, which in fact never was. And this fiction being beneficial to all parties, removal from the jurisdiction; the concealment, removal, or wrongful disposition of property by the defendant to delay or defraud his creditors; or fraudulent practices of various kinds, prejudicial to the interests of creditors or likely to interfere with the enforcement of their lawful claims. It is usually required that affidavit be made by the plaintiff to the court that sufficient grounds of arrest exist, and a good cause of action must also appear. Provision is also made for admitting the defendant to bail, but if not bailed he is kept in custody to await the event of the suit.

There is also another form of mesne process in common use, viz., the *attachment* of the defendant's property. The object is to secure the means of satisfying the judgment, if any be recovered against the defendant, and this is an important provisional remedy when the defendant has absconded or eluded process, or has attempted to conceal or dispose of his property, so that it cannot be made available for the benefit of his creditors.

The most common methods, therefore, of beginning actions in the United States, are by *summons* or equivalent process in ordinary cases; by *arrest* or by *attachment*, in special classes of cases, such as those above enumerated; but in some States a summons is used in all cases, whether process of arrest or attachment is used with it or not. In some States, common-law actions of nearly every kind may be begun by writ of attachment. In England, arrest upon mesne process is now abolished, except in very few instances.

is readily acquiesced in and is now become the settled practice. But where a defendant absconds, and the plaintiff would proceed to an outlawry against him, an original writ must then be sued out regularly, and after that a *capias*. And if the sheriff cannot find the defendant upon the first writ of *capias*, and return a *non est inventus*, there issues out an *alias* writ, and after that a *pluries*, to the same effect as the former: only after these words "we command you," this clause is inserted, "as we have *formerly*," or, "as we have often commanded you:—" "*sicut alias*," or "*sicut pluries, præcipimus*." And if a *non est inventus* is returned upon all of them, then a writ of *exigent* or *exigi facias* may be sued out, which requires the sheriff to cause the defendant to be proclaimed, required, or exacted in five county courts successively, to render himself; and if he does, then to take him as in a *capias*: but if he does not appear, and is returned *quinto exactus*, he shall then be outlawed by the coroners of the county. Such *outlawry* is putting a man out of the protection of the law, so that he is incapable to bring an action for redress of injuries; and it is also attended with a forfeiture of all one's goods and chattels to the king. If after outlawry the defendant appears publicly, he may be arrested by a writ of *capias utlagatum*, and committed till the outlawry be reversed. Which reversal may be had by the defendant's appearing personally in court or by attorney; and any plausible cause, however slight, will in general be sufficient to reverse it, it being considered only as a process to compel an appearance. But then the defendant must pay full costs, and put the plaintiff in the same condition as if he had appeared before the writ of *exigi facias* was awarded.³

Such is the first process in the court of *common pleas*. In the *king's bench* they *may* also (and frequently *do*) proceed in certain causes, particularly in actions of ejectment and trespass, by *original writ*, with *attachment* and *capias* thereon, returnable, not at Westminster, where the common pleas are now fixed in

³ The proceeding by outlawry in civil cases was finally abolished by statute 42 & 43 Vict. c. 59, and provision is now made by rules of court for the service of process upon defendants out of the jurisdiction and for the entry of judgment in case of their non-appearance. Outlawry in civil cases was also abolished in the United States at an early period; and provision is made by statute, in the several States, for the service of process in the case of absent, concealed, or absconding defendants, so as to give the court jurisdiction. (See *Hewitson v. Fabre*, 21 Q. B. D. 6; *Pennoyer v. Neff*, 95 U. S. 714.)

consequence of *magna carta*, but "*ubicunque fuerimus in Anglia*," wheresoever the king shall then be in England ; the king's bench being removable into any part of England at the pleasure and discretion of the crown. But the more usual method of proceeding therein is without any original, but by a peculiar species of process entitled a *bill of Middlesex* : and therefore so entitled, because the court now sits in that county ; for if it sat in *Kent*, it would then be a *bill of Kent*. The bill of Middlesex (which was formerly always founded on a *plaint* of trespass *quare clausum fregit*, entered on the records of the court) is a kind of *capias*, directed to the sheriff of that county, and commanding him to take the defendant, and have him before our lord the king at Westminster on a day prefixed, to answer to the plaintiff of a plea of trespass. For this accusation of trespass it is, that gives the court of king's bench jurisdiction in other civil causes, as was formerly observed ; since when once the defendant is taken into custody of the marshal, or prison-keeper of this court, for the supposed trespass, he being then a prisoner of this court, may here be prosecuted for any other species of injury. This bill of Middlesex must be served on the defendant by the sheriff, if he finds him in that county ; but, if he returns "*non est inventus*," then there issues out a writ of *latitat*, to the sheriff of another county, as Berks ; which is similar to the *testatum capias* in the common pleas, and recites the bill of Middlesex and the proceedings thereon, and that it is testified that the defendant "*latitat et discurrit*," lurks and wanders about in Berks ; and therefore commands the sheriff to take him, and have his body in court on the day of the return. But a *latitat* is usually sued out upon only a supposed, and not an actual *bill of Middlesex*. So that, in fact, a *latitat* may be called the first process in the court of king's bench, as the *testatum capias* is in the common pleas. Yet, as in the common pleas, if the defendant lives in the county wherein the action is laid, a common *capias* suffices ; so in the king's bench, likewise, if he lives in Middlesex, the process must still be by *bill of Middlesex* only.

In the exchequer the first process is by writ of *quo minus*, in order to give the court a jurisdiction over pleas between party and party. In which writ the plaintiff is alleged to be the king's farmer or debtor, and that the defendant hath done him the injury complained of ; *quo minus sufficiens existit*, by which he is

the less able to pay the king his rent, or debt. And upon this the defendant may be arrested as upon a *capias* from the common pleas.

Thus differently do the three courts set out at first, in the commencement of a suit, in order to entitle the two courts of king's bench and exchequer to hold plea in causes between subject and subject, which by the original constitution of Westminster-hall they were not empowered to do. Afterwards, when the cause is once drawn into the respective courts, the method of pursuing it is pretty much the same in all of them.

If the sheriff has found the defendant upon any of the former writs, the *capias*, *latitat*, &c., he was anciently obliged to take him into custody in order to produce him in court upon the return, however small and minute the cause of action might be. For, not having obeyed the original summons, he had shown a contempt of the court, and was no longer to be trusted at large. But when the summons fell into disuse, and the *capias* became in fact the first process, it was thought hard to imprison a man for contempt which was only supposed : and therefore in common cases by the gradual indulgence of the courts (at length authorized by statute), the sheriff or proper officer can now only personally serve the defendant with the copy of the writ or process, and with notice in writing to appear by his attorney in court to defend this action ; which in effect reduces it to a mere summons. And if the defendant thinks proper to appear upon this notice, his appearance is recorded, and he puts in sureties for his future attendance and obedience ; which sureties are called *common bail*, being two imaginary persons that were pledges for the plaintiff's prosecution, John Doe and Richard Roe. Or, if the defendant does not appear upon the return of the writ, or within four (or, in some cases, eight) days after, the plaintiff may enter an appearance for him, as if he had really appeared ; and may file common bail in the defendant's name, and proceed thereupon as if the defendant had done it himself.

But if the plaintiff will make *affidavit*, or assert upon oath, that the cause of action amounts to ten pounds or upwards, then he may arrest the defendant, and make him put in substantial sureties for his appearance, called *special bail*. The sum sworn to by the plaintiff is marked upon the back of the writ ; and the sheriff, or his officer the bailiff, is then obliged actually to arrest or take into custody the body of the defendant, and, having so done, to return the writ with a *cepi corpus* endorsed thereon.

An *arrest* must be by corporal seizing or touching the defendant's body ; after which the bailiff may justify breaking open the house in which he is to take him : otherwise he has no such power ; but must watch his opportunity to arrest him. For every man's house is looked upon by the law to be his castle of defence and asylum, wherein he should suffer no violence. Which principle is carried so far in the civil law, that for the most part not so much as a common citation or summons, much less an arrest, can be executed upon a man within his own walls. Peers of the realm, members of parliament, and corporations, are privileged from arrests ; and of course from outlawries. And against them the process to enforce an appearance must be by summons and distress infinite, instead of a *capias*. Also clerks, attorneys, and all other persons attending the courts of justice (for attorneys, being officers of the court, are always supposed to be there attending), are not liable to be arrested by the ordinary process of the court, but must be sued by *bill* (called usually a *bill of privilege*) as being personally present in court. Clergymen performing divine service, and not merely staying in the church with a fraudulent design, are for the time privileged from arrests, by stat. 50 Edw. III., ch. 5, and 1 Ric. II., ch. 16, as likewise members of convocation actually attending thereon, by statute 8 Hen. VI., ch. 1. Suitors, witnesses, and other persons, necessarily attending any courts of record upon business, are not to be arrested during their actual attendance, which includes their necessary coming and returning. And no arrest can be made in the king's presence, nor within the verge of his royal palace, nor in any place where the king's justices are actually sitting.⁴ And, lastly, by statute 29 Car. II., ch. 7, no arrest can be made, nor process served upon a Sunday, except for treason, felony, or breach of the peace.

⁴ The following classes of persons are also privileged from arrest in civil cases : Foreign ambassadors and the members of their household ; members of Congress and the State legislatures, while in attendance upon the bodies to which they belong ; electors, while attending an election ; married women, in certain cases, etc. The rules in regard to the arrest of parties, attorneys, jurors, witnesses, etc., at court, are the same in this country as stated in the text. If a privileged person be in fact arrested, he may be discharged, on motion to the proper court. But in *criminal* cases, none of these classes of persons have the same privilege, except ambassadors, and the persons of their household. A civil arrest cannot be made on Sunday, nor can the doors of the defendant's dwelling be broken by the officer, in order to effect the execution of process. But, in criminal cases, the rule is different.

When the defendant is regularly arrested, he must either go to prison, for safe custody : or put in *special bail* to the sheriff. For, the intent of the arrest being only to compel an appearance in court at the return of the writ, that purpose is equally answered, whether the sheriff detains his person, or takes sufficient security for his appearance, called *bail* (from the French word *bailleur*, to deliver), because the defendant is bailed, or delivered to his sureties, upon their giving security for his appearance : and is supposed to continue in their friendly custody instead of going to jail. The method of putting in bail to the sheriff is by entering into a bond or obligation, with one or more sureties, not fictitious persons, as in the former case of common bail, but real, substantial, responsible bondsmen, to insure the defendant's appearance at the return of the writ ; which obligation is called the *bail-bond*. The sheriff, if he pleases, *may* let the defendant go without any sureties ; but that is at his own peril : for, after once taking him, the sheriff is bound to keep him safely, so as to be forth-coming in court ; otherwise an action lies against him for an escape. But, on the other hand, he is obliged, by statute 23 Hen. VI., ch. 10, to take (if it be tendered) a sufficient bail-bond : and by statute 12 Geo. I., ch. 29, the sheriff shall take bail for no other sum than such as is sworn to by the plaintiff, and endorsed on the back of the writ.

Upon the return of the writ, or within four days after, the defendant must *appear* according to the exigency of the writ. This *appearance* is effected by putting in and justifying bail *to the action* ; which is commonly called putting in bail *above*. If this be not done, and the bail that were taken by the sheriff *below* are responsible persons, the plaintiff may take an assignment from the sheriff of the bail-bond (under the statute 4 & 5 Ann., ch. 16), and bring an action thereupon against the sheriff's bail. But if the bail, so accepted by the sheriff, be insolvent persons, the plaintiff may proceed against the sheriff himself by calling upon him, first, to return the writ (if not already done), and afterwards to bring in the body of the defendant. And, if the sheriff does not then cause sufficient bail to be put in and perfected *above*, he will himself be responsible to the plaintiff.

The bail *above*, or bail *to the action*, must be put in, either in open court, or before one of the judges thereof ; or else in the country, before a commissioner appointed for that purpose by

virtue of the statute 4 W. & M., ch. 4, which must be transmitted to the court. These bail, who must at least be two in number, must enter into a recognizance in court or before the judge or commissioner, in a sum equal (or in some cases double) to that which the plaintiff hath sworn to ; whereby they do jointly and severally undertake, that if the defendant be condemned in the action, he shall pay the costs and condemnation, or render himself a prisoner, or that they will pay it for him : which recognizance is transmitted to the court in a slip of parchment entitled a *bail-piece*. And, if excepted to, the bail must be *perfected*, that is, they must *justify* themselves in court, or before the commissioner in the country, by swearing themselves housekeepers, and each of them to be worth the full sum for which they are bail, after payment of all their debts. Special bail may be discharged, by surrendering the defendant into custody, within the time allowed by law ; for which purpose they are at all times entitled to a warrant to apprehend him.

Special bail is required (as of course) only upon actions of debt, or actions on the case in trover or for money due, where the plaintiff can swear that the cause of action amounts to ten pounds : but in actions where the damages are precarious, being to be assessed *ad libitum* by a jury, as in actions for words, ejectment, or trespass, it is very seldom possible for a plaintiff to swear to the amount of his cause of action ; and therefore no special bail is taken thereon, unless by a judge's order or the particular directions of the court, in some peculiar species of injuries, as in cases of mayhem or atrocious battery ; or upon such special circumstances as make it absolutely necessary, that the defendant should be kept within the reach of justice. Also in actions against heirs, executors, and administrators, for debts of the deceased, special bail is not demandable ; for the action is not so properly against them in person, as against the effects of the deceased in their possession. But special bail is required even of them, in actions for a *devastavit*, or wasting the goods of the deceased ; that wrong being of their own committing.

Thus much for *process* ; which is only meant to bring the defendant into court in order to contest the suit, and abide the determination of the law. When he appears either in person as a prisoner, or out upon bail, then follow the *pleadings* between the parties, which we shall consider at large in the next chapter.

CHAPTER XVI.

[BL. COMM.—BOOK III. CH. XX.]

Of Pleading.

PLEADINGS are the mutual altercations between the plaintiff and defendant ; which at present are set down and delivered into the proper office in writing, though formerly they were usually put in by their counsel *ore tenus*, or *viva voce*, in court, and then minuted down by the chief clerks, or prothonotaries ; whence in our old law French the pleadings are frequently denominated the *parol*.

The first of these is the *declaration*, *narratio*, or *count*, anciently called the *tale*, in which the plaintiff sets forth his cause of complaint at length, being indeed only an amplification or exposition of the original writ upon which his action is founded, with the additional circumstances of time and place, when and where the injury was committed.

In *local* actions, where possession of land is to be recovered, or damages for an actual trespass, or for waste, &c., affecting land, the plaintiff must lay his declaration or declare his injury to have happened in the very county and place that it really did happen ; but in *transitory* actions, for injuries that might have happened anywhere, as debt, detinue, slander, and the like, the plaintiff may declare in what county he pleases, and then the trial must be had in that county in which the declaration is laid. Though if the defendant will make affidavit that the cause of action, if any, arose not in that but in another county, the court will direct a change of the *venue* or *visne* (that is, the *vicinia* or neighborhood in which the injury is declared to be done), and will oblige the plaintiff to declare in the other county ; unless he will undertake to give material evidence in the first. For the statutes 6 Rich. II., ch. 2, and 4 Hen. IV., ch. 18, having ordered *all* writs to be laid in their proper counties, this, as the judges conceived, empowered them to change the *venue*, if required, and not to insist rigidly on abating the writ : which practice began in the reign of James the First.¹ And this power is dis-

¹ There are statutes in the various States of this country, providing for

cretionally exercised, so as to prevent and not to cause a defect of justice. Therefore the court will not change the *venue* to any of the four northern counties, previous to the spring circuit; because there the assizes are holden only once a year, at the time of the summer circuit. And it will sometimes remove the *venue* from the proper jurisdiction (especially of a narrow and limited kind), upon a suggestion duly supported, that a fair and impartial trial cannot be had therein.

It is generally usual, in actions upon the case, to set forth several cases by different *counts* in the same declaration; so that if the plaintiff fails in the proof of one, he may succeed in another. As, in an action on the case upon an *assumpsit* for goods sold and delivered, the plaintiff usually counts or declares, first, upon a settled and agreed price between him and the defendant; as that they bargained for twenty pounds: and lest he should fail in the proof of this, he counts likewise upon a *quantum valebant*; that the defendant bought other goods, and agreed to pay him so much as they were reasonably worth; and then avers that they were worth other twenty pounds; and so on in three or four different shapes; and at last concludes with declaring, that the defendant had refused to fulfil any of these agreements, whereby he is endamaged to such a value. And if he proves the case laid in any one of his counts, though he fails in the rest, he shall recover proportionable damages. This declaration always concludes with these words, "and thereupon he brings *suit*," &c., "*inde producit sectam*, &c." By which words, *suit* or *secta* (*a sequendo*), were anciently understood the witnesses or followers of the plaintiff. For in former times the law would not put the defendant to the trouble of answering the charge, till the plaintiff had made out at least a probable case. But the actual production of the *suit*, the *secta* or *followers*, is now antiquated; and hath been totally disused, at least ever since the reign of Edward the Third, though the form of it still continues.

At the end of the declaration are added also the plaintiff's common pledges of prosecution, John Doe and Richard Roe, **which**, as we before observed, are now mere names of form; though formerly they were of use to answer to the king for the the change of venue, in order to secure a trial in the proper county; to promote the convenience of witnesses; to obtain an impartial trial, and for other similar causes.

amercement of the plaintiff, in case he were nonsuited, barred of his action, or had a verdict or judgment against him. For if the plaintiff neglects to deliver a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against the rules of law in any subsequent stage of the action, he is adjudged *not to follow* or pursue his remedy as he ought to do, and thereupon a *nonsuit*, or *non prosequitur*, is entered, and he is said to be *nonprossed*. And for thus deserting his complaint, after making a false claim or complaint (*pro falso clamore suo*), he shall not only pay costs to the defendant, but is liable to be amerced to the king. A *retraxit* differs from a nonsuit, in that the one is negative, and the other positive; the nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again, upon payment of costs; but a *retraxit* is an open and voluntary renunciation of his suit, in court, and by this he for ever loses his action. A *discontinuance* is somewhat similar to a nonsuit; for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day, and time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend; but the plaintiff must begin again, by suing out a new original, usually paying costs to his antagonist.

When the plaintiff hath stated his case in the declaration, it is incumbent on the defendant within a reasonable time to make his *defence*, and to put in a *plea*; else the plaintiff will at once recover judgment by *default*, or *nihil dicit*, of the defendant.

Defence, in its true legal sense, signifies not a justification, protection, or guard, which is now its popular signification; but merely an *opposing* or *denial* (from the French verb *defender*) of the truth or validity of the complaint. It is the *contestatio litis* of the civilians: a general assertion that the plaintiff hath no ground of action, which assertion is afterwards extended and maintained in his plea. For it would be ridiculous to suppose that the defendant comes and *defends* (or, in the vulgar acceptation, justifies) the force and injury, in one line, and pleads that he is *not guilty* of the trespass complained of, in the next. And therefore in actions of dower, where the demandant doth not count of any injury done, but merely demands her endowment, and in assizes of land, where also there is no injury alleged, but

merely a question of right stated for the determination of the recognitors or jury, the tenant makes no such defence.

After defence made, the defendant must put in his *plea*. But before he defends, if the suit is commenced by *capias* or *latitat* without any special *original*, he is entitled to demand one *imparlance* or *licentia loquendi*; and may, before he pleads, have more time granted by consent of the court; to see if he can end the matter amicably without farther suit, by talking with the plaintiff a practice, which is supposed to have arisen from a principle of religion, in obedience to that precept of the gospel, "agree with thine adversary quickly, whilst thou art *in the way* with him." There are also many other previous steps which may be taken by a defendant before he puts in his plea. He may, in real actions, demand a *view* of the thing in question, in order to ascertain its identity and other circumstances. He may crave *oyer* of the writ, or of the bond or other specialty upon which the action is brought: that is to *hear* it read to him; the generality of defendants in the times of ancient simplicity being supposed incapable to read it themselves, whereupon the whole is entered *verbatim* upon the record, and the defendant may take advantage of any condition or other part of it, not stated in the plaintiff's declaration.¹ In real actions also the tenant may pray in *aid*, or call for assistance of another, to help him to plead, because of the feebleness or imbecility of his own estate. Thus a tenant for life may pray in aid of him that hath the inheritance in remainder or reversion; and an incumbent may pray in aid of the patron and ordinary: that is, that they shall be joined in the action, and held to defend the title. *Voucher* also is the calling in of some person to answer the action, that hath warranted the title to the tenant or defendant. This we still make use of in the form of common recoveries, which are grounded on a writ of entry; a species of action that we may remember relies chiefly on the weakness of the tenant's title, who therefore vouches another person to warrant it. If the vouchee appears, he is made defendant instead of the voucher: but, if he afterwards makes default, re-

¹ There are statutes, in the several States, providing that one of the parties to a suit may obtain an inspection or copy of books, papers, or documents in the possession of the other party, containing evidence relating to the merits of the action or the defense. This has superseded the former practice of demanding *oyer*. A similar statute has been enacted in England.

covery shall be had against the original defendant ; and he shall recover over an equivalent in value against the deficient vouchee.

When these proceedings are over, the defendant must then put in his excuse or plea. Pleas are of two sorts ; *dilatory* pleas, and pleas *to the action*. Dilatory pleas are such as tend merely to delay or put off the suit, by questioning the propriety of the remedy, rather than by denying the injury : pleas to the action are such as dispute the very cause of suit. The former cannot be pleaded after a general imparlance, which is an acknowledgment of the propriety of the action. For imparlances are either *general* of which we have before spoken, and which are granted of course ; or *special*, with a saving of all exceptions to the writ or count, which may be granted by the prothonotary ; or they may be still *more special*, with a saving of all exceptions whatsoever, which are granted at the discretion of the court.

1. Dilatory pleas are, 1. To the *jurisdiction* of the court : alleging, that it ought not to hold plea of this injury, it arising in Wales or beyond sea ; or because the land in question is of ancient demesne, and ought only to be demanded in the lord's court, &c. 2. To the *disability* of the plaintiff, by reason whereof he is incapable to commence or continue the suit ; as, that he is an alien enemy, outlawed, excommunicated, attainted of treason or felony, under a *præmunire*, not *in rerum natura* (being only a fictitious person), an infant, a feme-covert, or a monk professed. 3. In *abatement*, which abatement is either of the writ or the count, for some defect in one of them ; as by misnaming the defendant, which is called a *misnomer* ; giving him a wrong addition, as *esquire* instead of *knight* ; or other want of form in any material respect. Or, if may be, that the plaintiff is dead ; for the death of either party is at once an abatement of the suit. And in actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that *actio personalis moritur cum persona* ; and it never shall be revived either by or against the executors or other representatives.³ For neither the executors of the plain-

³ But this maxim is not now generally held applicable to torts affecting property, but only to mere personal torts, such as assault and battery, false imprisonment, libel, etc. But if the wrong be an injury to rights of property, as trespass or conversion, a right of action will exist by or against the executor or administrator of the deceased, and will not be held to die with the person. (*Price v. Price*, 75 N. Y. 244; *Cum-*

tiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury. But in actions arising *ex contractu*, by breach of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against or by the executors: being indeed rather actions against the property than the person, in which the executors have now the same interest that their testator had before.

These pleas to the jurisdiction, to the disability, or in abatement, were formerly very often used as mere dilatory pleas, without any foundation of truth, and calculated only for delay; but now by statute 4 & 5 Ann., ch. 16, no dilatory plea is to be admitted, without affidavit made of the truth thereof, or some probable matter shown to the court to induce them to believe it true. And with respect to the pleas themselves, it is a rule, that no exception shall be admitted against a declaration or writ, unless the defendant will in the same plea give the plaintiff a better; that is, show him how it might be amended, that there may not be two objections upon the same account. Neither, by statute 8 & 9 Wm. III., ch. 31, shall any plea in abatement be admitted in any suit for partition of lands; nor shall the same be abated by reason of the death of any tenant.

All pleas to the jurisdiction conclude to the cognizance of the court: praying "judgment, whether the court will have further cognizance of the suit:" pleas to the disability conclude to the person; by praying "judgment, if the said A. the plaintiff ought to be answered:" and pleas in abatement (when the suit is by original) conclude to the writ or declaration; by praying "judgment of the writ, or declaration, and that the same may be quashed," *cassetur*, made void, or abated; but, if the action be by bill, the plea must pray "judgment of the bill," and not of the declaration; the bill being here the original, and the declaration only a copy of the bill.

mings v. Bird, 115 Mass. 346; see 83 N. Y. 595; 68 Md. 56; 46 O. St. 442.) Actions for fraud or negligence resulting in damage to property, or affecting property rights, will also survive. (103 N. Y. 425; see 147 Mass. 471.) There is one important case of breach of contract, in which a right of action does not survive, viz., where there is a cause of action for breach of promise of marriage. (*Wade v. Kalbfleisch*, 58 N. Y. 282; *Finlay v. Chirney*, 20 Q. B. D. 494.)

When these dilatory pleas are allowed, the cause is either dismissed from that jurisdiction ; or the plaintiff is stayed till his disability be removed ; or he is obliged to sue out a new writ, by leave obtained from the court : or to amend and new-frame his declaration. But when on the other hand they are overruled as frivolous, the defendant has judgment of *respondeat ouster*, or to *answer over* in some better manner. It is then incumbent on him to plead.

2. A plea *to the action* ; that is, to answer to the merits of the complaint. This is done by confessing or denying it.

A confession of the whole complaint is not very usual, for then the defendant would probably end the matter sooner ; or not plead at all, but suffer judgment to go by default. Yet sometimes, after tender and refusal of a debt, if the creditor harasses his debtor with an action, it then becomes necessary for the defendant to acknowledge the debt, and plead the tender ; adding, that he has always been ready, *tout temps prist*, and still is ready, *uncore prist*, to discharge it : for a tender by the debtor and refusal by the creditor will in all cases discharge the costs, but not the debt itself ; though in some particular cases the creditor will totally lose his money. But frequently the defendant confesses one *part* of the complaint (by a *cognovit actionem* in respect thereof), and traverses or denies the rest : in order to avoid the expense of carrying that part to a formal trial, which he has no ground to litigate. A species of this sort of confession is the *payment of money into court* : which is for the most part necessary upon pleading a tender, and is itself a kind of tender to the plaintiff ; by paying into the hands of the proper officer of the court as much as the defendant acknowledges to be due, together with the costs hitherto incurred, in order to prevent the expense of any farther proceedings. This may be done upon what is called a *motion* ; which is an occasional application to the court by the parties or their counsel, in order to obtain some rule or order of court, which becomes necessary in the progress of a cause ; and it is usually grounded upon an *affidavit* (the perfect tense of the verb *affido*), being a voluntary oath before some judge or officer of the court, to evince the truth of certain facts, upon which the motion is grounded : though no such *affidavit* is necessary for payment of money into court. If after the money paid in, the plaintiff proceeds in his suit, it is at his own peril :

for, if he does not prove more due than is so paid into court, he shall be nonsuited and pay the defendant costs ; but he shall still have the money so paid in, for that the defendant has acknowledged to be his due. To this head may also be referred the practice of what is called a *set-off*: whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand ; but on the other sets up a demand of his own, to counter-balance that of the plaintiff, either in the whole or in part : as, if the plaintiff sues for ten pounds due on a note of hand, the defendant may set off nine pounds due to himself for merchandise sold to the plaintiff, and in case he *pleads* such set-off, must pay the remaining balance into court. This answers very nearly to the *compensatio*, or *stoppage*, of the civil law, and depends on the statutes 2 Geo. II., ch. 22, and 8 Geo. II., ch. 24, which enact, that where there are mutual debts between the plaintiff and defendant, one debt may be set against the other, and either pleaded in bar or given in evidence upon the general issue at the trial ; which shall operate as payment, and extinguish so much of the plaintiff's demand.

Pleas, that totally deny the cause of complaint, are either the *general* issue, or a *special* plea, in bar.

1. The *general* issue, or general plea, is what traverses, thwarts, and denies at once the whole declaration ; without offering any special matter whereby to evade it. As in trespass either *vi et armis*, or on the case, *non culpabilis*, not guilty ; in debt upon contract, *nihil debet*, he owes nothing ; in debt on bond, *non est factum*, it is not his deed ; on an *assumpsit*, *non assumpsit*, he made no such promise. Or in real actions, *nul tort*, no wrong done ; *nul disseizin*, no disseizin : and in a writ of right, the mise or issue is, that the tenant has more right to hold than the demandant has to demand. These pleas are called the general issue, because, by importing an absolute and general denial of what is alleged in the declaration, they amount at once to an issue : by which we mean a fact affirmed on one side and denied on the other.

Formerly the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him. But when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a *special* plea ; which was originally intended to apprise the court and the adverse party of the nature and circumstances of

the defence, and to keep the law and the fact distinct. And it is an invariable rule, that every defence which cannot be thus specially pleaded, may be given in evidence upon the general issue at the trial. But the science of special pleading having been frequently perverted to the purposes of chicane and delay, the courts have of late in some instances, and the legislature in many more, permitted the general issue to be pleaded, which leaves every thing open, the fact, the law, and the equity of the case : and have allowed special matter to be given in evidence at the trial. And, though it should seem as if much confusion and uncertainty would follow from so great a relaxation of the strictness anciently observed, yet experience has shown it to be otherwise ; especially with the aid of a new trial, in case either party be unfairly surprised by the other.

2. Special pleas, *in bar* of the plaintiff's demand, are very various, according to the circumstances of the defendant's case. As, in real actions, a general release or a fine, both of which may destroy and bar the plaintiff's title. Or, in personal actions, an accord, arbitration, conditions performed, nonage of the defendant, or some other fact which precludes the plaintiff from his action. A *justification* is likewise a special plea in bar ; as in actions of assault and battery, *son assault demesne*, that it was the plaintiff's own original assault ; in trespass, that the defendant did the thing complained of in right of some office which warranted him so to do ; or, in an action of slander, that the plaintiff is really as bad a man as the defendant said he was.

Also a man may plead the statutes of limitation in bar ; or the time limited by certain acts of parliament, beyond which no plaintiff can lay his cause of action. By statute 21 Jac. I. ch. 16, all actions of trespass, detinue, trover, replevin, account, and case (except upon accounts between merchants), debt on simple contract, or for arrears of rent, are limited to *six* years after the cause of action commenced. The use of these statutes of limitation is to preserve the peace of the kingdom, and to prevent those innumerable perjuries which might ensue, if a man were allowed to bring an action for any injury committed at any distance of time. Upon both these accounts the law therefore holds, that "*interest reipublicæ ut sit finis litium* : " and upon the same principle the Athenian laws in general prohibited all actions where the injury was committed *five* years before the complaint

was made. If therefore in any suit, the injury or cause of action happened earlier than the period expressly limited by law, the defendant may plead the statutes of limitations in bar : as upon an *assumpsit*, or promise to pay money to the plaintiff, the defendant may plead *non assumpsit infra sex annos* ; he made no such promise within six years ; which is an effectual bar to the complaint.

An *estoppel* is likewise a special plea in bar ; which happens where a man hath done some act, or executed some deed, which estops or precludes him from averring any thing to the contrary. As if tenant for years (who hath no freehold) levies a fine to another person. Though this is void as to strangers, yet it shall work as an estoppel to the cognizor : for if he afterwards brings an action to recover these lands, and his fine is pleaded against him, he shall thereby be estopped from saying, that he had no freehold at the time, and therefore was incapable of levying it.

The conditions and qualities of a plea (which, as well as the doctrine of estoppels, will also hold equally, *mutatis mutandis*, with regard to other parts of pleading) are, 1. That it be single and containing only one matter ; for duplicity begets confusion. But by statute 4 & 5 Ann., ch. 16, a man with leave of the court may plead two or more distinct matters or single pleas ; as, in an action of assault and battery, these three, not guilty, *son assault demesne*, and the statute of limitations. 2. That it be direct and positive, and not argumentative. 3. That it have convenient certainty of time, place, and persons. 4. That it answer the plaintiff's allegations in every material point. 5. That it be so pleaded as to be capable of trial.

Special pleas are usually in the affirmative, sometimes in the negative ; but they always advance some new fact not mentioned in the declaration ; and then they must be averred to be true in the common form,—“and this he is ready to verify.” This is not necessary in pleas of the general issue ; those always containing a total denial of the facts before advanced by the other party, and therefore putting him upon the proof of them.

It is a rule in pleading, that no man be allowed to plead specially such a plea as amounts only to the general issue, or a total denial of the charge ; but in such case he shall be driven to plead the general issue in terms, whereby the whole question is referred to a jury. But if the defendant, in an assize or action of trespass, be desirous to refer the validity of his title to the

court rather than the jury, he may state his title specially, and at the same time *give color* to the plaintiff, or suppose him to have an appearance or color of title, bad indeed in point of law, but of which the jury are not competent judges. As if his own true title be, that he claims by feoffment, with livery from A., by force of which he entered on the lands in question, he cannot plead this by itself, as it amounts to no more than the general issue, *nul tort, nul disseizin*, in assize, or *not guilty* in an action of trespass. But he may allege this specially, provided he goes farther and says, that the plaintiff, claiming by *color* of a prior deed of feoffment without livery, entered ; upon whom he entered ; and may then refer himself to the judgment of the court which of these two titles is the best in point of law.

When the plea of the defendant is thus put in, if it does not amount to an issue or total contradiction of the declaration but only evades it, the plaintiff may plead again, and *reply* to the defendant's plea : either traversing it ; that is, totally denying it ; as, if on an action of debt upon bond the defendant pleads *solvit ad diem*, that he paid the money when due, here the plaintiff in his *replication* may totally traverse this plea, by denying that the defendant paid it : or, he may allege new matter in contradiction to the defendant's plea ; as when the defendant pleads *no award made*, the plaintiff may reply and set forth an actual award, and assign a breach ; or the replication may *confess and avoid* the plea, by some new matter or distinction consistent with the plaintiff's former declaration ; as, in an action for trespassing upon land whereof the plaintiff is seized, if the defendant shews a title to the land by descent, and that therefore he had a right to enter, and gives color to the plaintiff, the plaintiff may either traverse and totally deny the fact of the descent ; or he may confess and avoid it, by replying, that true it is that such descent happened, but that since the descent the defendant himself demised the lands to the plaintiff for term of life. To the replication the defendant may *rejoin*, or put in an answer called a *rejoinder*. The plaintiff may answer the rejoinder by a *sur-rejoinder* ; upon which the defendant may *rebut* ; and the plaintiff answer him by a *sur-rebutter*. Which pleas, replications, rejoinders, sur-rejoinders, rebutters, and sur-rebutters, answer to the *exceptio, replicatio, duplicatio, triplicatio*, and *quadruplicatio* of the Roman laws.

The whole of this process is denominated the *pleading* ; in

the several stages of which it must be carefully observed, not to depart or vary from the title or defence, which the party has once insisted on. For this (which is called a *departure*, in pleading) might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder must support the plea, without departing out of it. As in the case of pleading no award made, in consequence of a bond of arbitration, to which the plaintiff replies, setting forth an actual award; now the defendant cannot rejoin that he hath performed this award, for such rejoinder would be an entire departure from his original plea, which alleged that no such award was made: therefore he has now no other choice, but to traverse the fact of the replication, or else to demur upon the law of it.

Yet in many actions the plaintiff, who has alleged in his declaration a general wrong, may in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh with all its specific circumstances in such manner as clearly to ascertain and identify it, consistently with his general complaint; which is called a *new or novel assignment*. As if the plaintiff in trespass declares on a breach of his close in D.; and the defendant pleads that the place where the injury is said to have happened is a certain close of pasture in D., which descended to him from B. his father, and so is his own freehold; the plaintiff may reply and assign another close in D., specifying the abuttals and boundaries, as the real place of the injury.

It hath previously been observed that *duplicity* in pleading must be avoided. Every plea must be simple, entire, connected, and confined to one single point: it must never be entangled with a variety of distinct independent answers to the same matter; which must require as many different replies and introduce a multitude of issues upon one and the same dispute. For this would often embarrass the jury, and sometimes the court itself, and at all events would greatly enhance the expense of the parties.

In any stage of the pleadings when either side advances or affirms any new matter, he usually (as was said) avers it to be true; "and this he is ready to verify." On the other hand, when either side traverses or denies the facts pleaded by his antagonist, he usually tenders an issue, as it is called; the language of

which is different according to the party by whom the issue is tendered ; for if the traverse or denial comes from the defendant, the issue is tendered in this manner, " and of this he puts himself upon the country," thereby submitting himself to the judgment of his peers ; but if the traverse lies upon the plaintiff, he tenders the issue, or prays the judgment of the peers against the defendant in another form ; thus : " and this he prays may be inquired of by the country."

But if either side (as, for instance, the defendant) pleads a special negative plea ; not traversing or denying anything that was before alleged, but disclosing some new negative matter ; as where the suit is on a bond, conditioned to perform an award, and the defendant pleads, negatively, that no award was made, he tenders no issue upon this plea ; because it does not appear whether the fact will be disputed, the plaintiff not having yet asserted the existence of any award ; but when the plaintiff replies, and sets forth an actual specific award, if then the defendant traverses the replication, and denies the making of any such award, he then, and not before, tenders an issue to the plaintiff. For when in the course of pleading they come to a point which is affirmed on one side, and denied on the other, they are then said to be at issue ; all their debates being at last contracted into a single point, which must now be determined either in favor of the plaintiff or of the defendant.⁴

⁴In New York, a code of civil procedure was adopted in 1848, by which the common-law system of pleading was superseded by a simplified system, reducing the number of pleadings, and abolishing many of the artificial, technical rules, by which the art of pleading was formerly rendered intricate and peculiarly difficult. A number of the other States have since adopted similar codes of practice. Under this new system, the first pleading by the plaintiff is termed the " complaint," which answers to the former " declaration." The first pleading of the defendant is the " answer," corresponding to the " plea " of the common law ; the next pleading is the " reply," answering to the " replication ; " and provision is made for bringing the parties to issue without a further succession of pleadings. The " answer " may contain either a general or specific denial, (answering to the former " traverse"), or an allegation of new matter constituting a defense (answering to the former plea in confession and avoidance), or a statement of counter-claim (similar to the former set-off, and similar defenses.) These pleadings raise issues of *fact* ; but the parties may raise an issue of *law* by demurrer, at various stages in the progress of the pleadings. In other States, in which similar codes have not been adopted, the rules and methods of the common-law have been, to a considerable extent, modified by statute.

CHAPTER XVII.

[BL. COMM.—BOOK III. CH. XXI.]

Of Issue and Demurrer.

ISSUE, *exitus*, being the end of all the pleadings, is the fourth part or stage of an action, and is either upon matter of *law*, or matter of *fact*.

An issue upon matter of law is called a *demurrer*: and it confesses the facts to be true, as stated by the opposite party; but denies that, by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse; according to the party which first demurs, *demoratur*, rests or abides upon the point in question. As, if the matter of the plaintiff's complaint or declaration be insufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to the declaration: if, on the other hand, the defendant's excuse or plea be invalid, as if he pleads that he committed the trespass by authority from a stranger, without making out the stranger's right; here the plaintiff may demur in law to the plea: and so on in every other part of the proceedings, where either side perceives any material objection in point of law upon which he may rest his case.

The form of such demurrer is by averring the declaration or plea, the replication or rejoinder, to be insufficient in law to maintain the action or the defence; and therefore praying judgment for want of sufficient matter alleged. Sometimes demurrers are merely for want of sufficient *form* in the writ or declaration. But in cases of exceptions to the form or manner of pleading, the party demurring must by statute 27 Eliz., ch. 5, and 4 & 5 Ann., ch. 16, set forth the causes of his demurrer, or wherein he apprehends the deficiency to consist. And upon either a *general*, or such a *special* demurrer, the opposite party must aver it to be sufficient, which is called a joinder in demurrer, and then the parties are at issue in point of law. Which issue in law, or demurrer, the judges of the court before which the action is brought must determine.¹

¹ Special demurrers which are objections based merely upon matter of

An issue of fact is where the fact only, and not the law, is disputed. And when he that denies, or traverses the fact pleaded by his antagonist has tendered the issue, thus; "and this he prays may be inquired of by the country;" or, "and of this he puts himself upon the country;" it may immediately be subjoined by the other party, "and the said A. B. doth the like." Which done, the issue is said to be joined, both parties having agreed to rest the fate of the cause upon the truth of the fact in question. And this issue of fact must, generally speaking, be determined, not by the judges of the court, but by some other method; the principal of which methods is that by the country, *per pais* (in Latin *per patrium*), that is, by jury.

But here it will be proper to observe, that during the whole of these proceedings from the time of the defendant's appearance in obedience to the king's writ, it is necessary that both the parties be kept or *continued* in court from day to day, till the final determination of the suit. For the court can determine nothing unless in the presence of both the parties, in person or by their attorneys, or upon default of one of them, after his original appearance and a time prefixed for his appearance in court again. Therefore in the course of pleading, if either party neglects to put in his declaration, plea, replication, rejoinder, and the like, within the times allotted by the standing rules of the court, the plaintiff, if the omission be his, is said to be *nonsuit*, or not to follow and pursue his complaint, and shall lose the benefit of his writ: or, if the negligence be on the side of the defendant, judgment may be had against him, for such his default. And after issue or demurrer joined, as well as in some of the previous stages of proceeding, a day is continually given and entered upon the record, for the parties to appear on from time to time, as the exigence of the case may require. The giving of this day is called the *continuance*, because thereby the proceedings are continued without interruption from one adjournment to another. If these continuances are omitted, the cause is thereby discontinued, and the defendant is discharged *sine die*, without a day, form, and not upon substantial defects, have been, in modern times, either entirely abolished, or much limited in importance. Ample powers of amendment are given by statute, in order to remedy such defects or errors in pleading: and they are not permitted to affect the real merits of the cause by determining finally the controversy between the parties. In many American States, objection for these formal defects is now taken by motion instead of by demurrer. (See 83 N. Y. 14.)

for this turn: for by his appearance in court he has obeyed the command of the king's writ; and, unless he be adjourned over to a certain day, he is no longer bound to attend upon that summons, but he must be warned afresh, and the whole must begin *de novo*.

Now it may sometimes happen, that after the defendant has pleaded, nay, even after issue or demurrer joined, there may have arisen some new matter, which it is proper for the defendant to plead; as that the plaintiff being a feme-sole, is since married, or that she has given the defendant a release, and the like: here if the defendant takes advantage of this new matter, as early as he possibly can, *viz.*, at the day given for his next appearance, he is permitted to plead it in what is called a plea of *puis darrein continuance*, or since the last adjournment. For it would be unjust to exclude him from the benefit of this new defence, which it was not in his power to make when he pleaded the former.² But it is dangerous to rely on such a plea, without due consideration; for it confesses the matter which was before in dispute between the parties. And it is not allowed to be put in, if any continuance has intervened between the arising of this fresh matter and the pleading of it: for then the defendant is guilty of neglect, or *laches*, and is supposed to rely on the merits of his former plea. And these pleas *puis darrein continuance*, when brought to a demurrer in law or issue of fact, shall be determined in like manner as other pleas.

We have said, that demurrers, or questions concerning the *sufficiency* of the matters alleged in the pleadings, are to be determined by the judges of the court, upon solemn argument by counsel on both sides, and to that end a demurrer-book is made up, containing all the proceedings at length, which are afterwards entered on *record* and copies thereof called *paper books* are delivered to the judges to peruse. The *record* is a history of the most material proceedings in the cause entered on a parchment-roll, and continued down to the present time; in which must be stated the original writ and summons, all the pleadings, the declaration, view or *oyer* prayed, the imparlances, plea, replication, rejoinder, continuances, and whatever farther proceedings have been had; all entered *verbatim* on the roll, and also the issue or demurrer, and joinder therein.

² Additional defenses of these kinds are now generally allowed to be introduced in all States, by a supplemental pleading, or an amendment of original pleading.

These were formerly all written, as indeed all public proceedings were, in Norman or law French, and even the arguments of the counsel and decisions of the court were in the same barbarous dialect. This continued till the reign of Edward III. By a statute passed in the thirty-sixth year of his reign, it was enacted that for the future all pleas should be pleaded, shown, defended, answered, debated, and judged in the English tongue ; but be entered and enrolled in Latin. This technical Latin continued in use from the time of its first introduction, till the subversion of our ancient constitution under Cromwell ; when, among many other innovations in the law, some for the better and some for the worse, the language of our records was altered and turned into English. But, at the restoration of King Charles, this novelty was no longer countenanced ; the practicers finding it very difficult to express themselves so concisely or significantly in any other language but the Latin. And thus it continued without any sensible inconvenience till about the year 1730, when it was again thought proper that the proceedings at law should be done into English, and it was accordingly so ordered by statute 4 Geo. II., ch. 26.

When the substance of the record is completed, and copies are delivered to the judges, the matter of law upon which the demurrer is grounded is upon solemn argument determined by the court, and not by any trial by jury ; and judgment is thereupon accordingly given. As, in an action of trespass, if the defendant in his plea confesses the fact, but justifies it *causa venationis*, for that he was hunting ; and to this the plaintiff demurs, that is, he admits the truth of the plea, but denies the justification to be legal : now, on arguing this demurrer, if the court be of opinion, that a man may not justify trespass in hunting, they will give judgment for the plaintiff ; if they think that he may, then judgment is given for the defendant. Thus is an issue in law, or demurrer, disposed of.

An issue of fact takes up more form and preparation to settle it ; for here the truth of the matters alleged must be solemnly examined and established by proper evidence in the channel prescribed by law. To which examination of facts, the name of trial is usually confined, which will be treated of at large in the succeeding chapter.

CHAPTER XVIII.

[BL. COMM.—BOOK III. CH. XXIII.]

Of the Trial by Fury.

THE subject of our next inquiries will be the nature and method of the trial *by jury*; called also the trial *per pais*, or *by the country*: a trial that hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof.¹ Some authors have endeavored to trace the original of juries up as high as the Britons themselves, the first inhabitants of our island; but certain it is that they were in use among the earliest Saxon colonies, their institution being ascribed by Bishop Nicholson to Woden himself, their great legislator and captain. Hence it is, that we may find traces of juries in the laws of all those nations which adopted the feudal system, as in Germany, France, and Italy; who had all of them a tribunal composed of twelve good men and true, "*boni homines*," usually the vassals or tenants of the lord, being the equals or peers of the parties litigant; and, as the lord's vassals judged each other in the lord's courts, so the king's vassals, or 'he lords themselves,

¹ The chapter immediately preceding this in the original text of Blackstone treats of several modes of trial, most of which have been long obsolete, and has therefore been omitted in this edition. But one of these methods of trial is of sufficient importance to deserve at least brief mention. This is the trial by record. It is thus described by Blackstone: "This is only used in one particular instance; and that is where a matter of record is pleaded in any action, as a judgment, or the like; and the opposite party pleads "*nul tiel record*," that there is no such matter of record existing; upon this, issue is tendered and joined in the following form: 'And this he prays may be inquired of by *the record*, and the other doth the like;' and hereupon the party pleading the record has a day given him to bring it in, and proclamation is made in court for him to 'bring forth the record by him in pleading alleged, or else he shall be condemned;' and on his failure, his antagonist shall have judgment to recover. The trial, therefore, of this issue is merely by the record; for, as Sir Edward Coke observes, 'a record or enrolment is a monument of so high a nature, and importeth in itself such absolute verity, that if it be pleaded that there is no such record, it shall not receive any trial by jury or otherwise, but only by itself.'"

judged each other in the king's court. In England we find actual mention of them so early as the laws of King Ethelred, and that not as a new invention, Stiernhook ascribes the invention of the jury, which in the Teutonic language is denominated *nembda*, to Regner, king of Sweden and Denmark, who was contemporary with our King Egbert. Just as we are apt to impute the invention of this, and some other pieces of juridical polity, to the superior genius of Alfred the Great ; to whom, on account of his having done much, it is usual to attribute everything ; and as the tradition of ancient Greece placed to the account of their own Hercules whatever achievement was performed superior to the ordinary prowess of mankind. Whereas the truth seems to be, that this tribunal was universally established among all the Northern nations, and so interwoven in their very constitution, that the earliest accounts of the one give us also some traces of the other. Its establishment, however, and use, in this island, of what date soever it be, though for a time greatly impaired and shaken by the introduction of the Norman trial by battle, was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it. In *magna charta* it is more than once insisted on as the principal bulwark of our liberties ; but especially by chapter 29, that no freeman shall be hurt in either his person or property ; “ *nisi per legale judicium parium suorum vel per legem terræ.*” A privilege which is couched in almost the same words with that of the Emperor Conrad, two hundred years before : “ *nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum et per judicium parium suorum.*” And it was ever esteemed, in all countries, a privilege of the highest and most beneficial nature.

With regard to the *ordinary* trial by jury in civil cases, I shall pursue the same method in considering it, that I set out with in explaining the nature of prosecuting actions in general, *viz.*, by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

When therefore an issue is joined, by these words, “ and this the said A. prays may be inquired of by the country,” or, “ and of this he puts himself upon the country,—and the said B does the like,” the court awards a writ of *venire facias* upon the roll or record, commanding the sheriff “ that he cause to come *here*

on such a day, twelve free and lawful men, *liberos et legales homines*, of the body of his county, by whom the truth of the matter may be better known, and who are neither of kin to the aforesaid A., nor the aforesaid B., to recognize the truth of the issue between the said parties." And such writ was accordingly issued to the sheriff.

Thus the cause stands ready for a trial *at the bar* of the court itself, for all trials were there anciently had, in actions which were there first commenced ; which then never happened but in matters of weight and consequence, all trifling suits being ended in the court-baron, hundred, or county courts : and indeed all causes of great importance or difficulty are still usually retained upon motion, to be tried at the bar in the superior courts. But when the usage began to bring actions of any trifling value into the courts of Westminster-hall, it was found to be an intolerable burthen to compel the parties, witnesses, and jurors, to come from Westmoreland, perhaps, or Cornwall, to try an action of assault at Westminster. A practice therefore very early obtained, of *continuing* the cause from term to term, in the court above, provided the justices in eyre did not previously come into the county where the cause of action arose ; and if it happened that they arrived there within that interval, then the cause was removed from the jurisdiction of the justices at Westminster to that of the justices in eyre. Afterwards, when the justices in eyre were superseded by the modern justices of assize (who came twice or thrice in the year into the several counties, *ad capiendas assizas*, to take or try writs of assize, of *mort d'ancestor*, *novel disseizin*, *nuisance*, and the like), a power was superadded by statute Westm. 2, 13 Edw. I., ch. 30, to these justices of assize to try common issues in trespass, and other less important suits, with direction to return them (when tried) into the court above, where alone the judgment should be given. And as only the trial, and not the determination of the cause, was now intended to be had in the court below, therefore the clause of *nisi prius* was left out of the conditional *continuances* before mentioned, and was directed by the statute to be inserted in the writs of *venire facias* ; that is, " that the sheriff should cause the jurors to come to Westminster (or wherever the king's court should be held) on such a day in Easter and Michaelmas terms ; *nisi prius*, unless before that day the justices assigned to take assizes shall

come into his said county." By virtue of which the sheriff returned his jurors to the court of the justices of assize, which was sure to be held in the vacation before Easter and Michaelmas terms : and there the trial was had.

• An inconvenience attended this provision : principally because, as the sheriff made no return of the jury to the court at Westminster, the parties were ignorant who they were till they came upon the trial, and therefore were not ready with their challenges or exceptions. For this reason, by the statute 42 Edw. III., ch. 11, the method of trials by *nisi prius* was altered ; and it was enacted that no inquests (except of assize and gaol delivery) should be taken by writ of *nisi prius*, till after the sheriff had returned the names of the jurors to the court above. So that now in almost every civil cause the clause of *nisi prius* is left out of the writ of *venire facias*, which is the sheriff's warrant to warn the jury ; and is inserted in another part of the proceedings, as we shall see presently.

For now the course is, to make the sheriff's *venire* returnable on the last return of the same term wherein issue is joined, *viz.*, Hilary or Trinity terms ; which from the making up of the issues therein are usually called *issuable* terms. And he returns the names of the jurors in a *panel* (a little pane, or oblong piece of parchment) annexed to the writ. This jury is not summoned, and therefore, not appearing at the day, must unavoidably make default. For which reason a compulsive process is now awarded against the jurors, called in the common pleas a writ of *habeas corpora juratorum*, and in the king's bench a *distringas*, commanding the sheriff to have their bodies or to distrain them by their lands and goods, that they may appear upon the day appointed. The entry therefore on the roll or record is "that the jury is respited, through defect of the jurors, till the first day of the next term, then to appear at Westminster ; unless before that time, *viz.*, on Wednesday the fourth of March, the justices of our lord the king, appointed to take assizes in that county, shall have come to Oxford, that is, to the place assigned for holding the assizes." And thereupon the writ commands the sheriff to have their bodies at Westminster on the said first day of next term, or before the said justices of assize, if before that time they come to Oxford ; *viz.*, on the fourth of March aforesaid. And, as the judges are sure to come and open the circuit commissions

on the day mentioned in the writ, the sheriff returns and summons the jury to appear at the assizes, and there the trial is had before the justices of *assize* and *nisi prius*: among whom (as hath been said) are usually two of the judges of the courts of Westminster, the whole kingdom being divided into six circuits for this purpose. And thus we may observe that the trial of common issues, at *nisi prius*, which was in its original only a collateral incident to the original business of the justices of assize, is now, by the various revolutions of practice, become their principal civil employment: hardly anything remaining in use of the real *assizes* but the name.

If the sheriff be not an indifferent person; as if he be a party in the suit, or be related by either blood or affinity to either of the parties, he is not then trusted to return the jury, but the *venire* shall be directed to the coroners, who in this, as in many other instances, are the substitutes of the sheriff, to execute process when he is deemed an improper person. If any exception lies to the coroners, the *venire* shall be directed to two clerks of the court, or two persons of the county named by the court, and sworn. And these two, who are called *elisors*, or electors, shall indifferently name the jury, and their return is final; no challenge being allowed to their array.

When the general day of trials is fixed, the plaintiff or his attorney must bring down the record to the assizes, and enter it with the proper officer, in order to its being called on in course. If it be not so entered, it cannot be tried; therefore it is in the plaintiff's breast to delay any trial by not carrying down the record: unless the defendant, being fearful of such neglect in the plaintiff, and willing to discharge himself from the action, will himself undertake to bring on the trial, giving proper notice to the plaintiff. Which proceeding is called the trial by *proviso*; by reason of the clause then inserted in the sheriff's *venire*, viz., "*proviso*, provided that if two writs come to your hands (that is, one from the plaintiff and another from the defendant), you shall execute only one of them." But this practice hath begun to be disused, since the statute 14 Geo. II., ch. 17, which enacts, that if, after issue joined, the cause is not carried down to be tried according to the course of the court, the plaintiff shall be esteemed to be non-suited, and judgment shall be given for the defendant as in case of a non-suit. In case the plaintiff intends to try

the cause, he is bound to give the defendant (if he lives within forty miles of London) eight days' notice of trial; and, if he lives at a greater distance, then fourteen days' notice, in order to prevent surprise: and if the plaintiff then changes his mind, and does not countermand the notice six days before the trial, he shall be liable to pay costs to the defendant for not proceeding to trial, by the same last mentioned statute. The defendant, however, or plaintiff, may, upon good cause shown to the court above, as upon absence or sickness of a material witness, obtain leave upon motion to defer the trial of the cause till the next assizes.

But we will now suppose all previous steps to be regularly settled, and the cause to be called on in court. The record is then handed to the judge, to peruse and observe the pleadings, and what issues the parties are to maintain and prove, while the jury is called and sworn. To this end the sheriff returns his compulsive process, the writ of *habeas corpora*, or *distringas*, with the panel of jurors annexed, to the judge's officer in court. The jurors contained in the panel are either *special* or *common* jurors. *Special* juries were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him. He is in such cases, upon motion in court and a rule granted thereupon, to attend the prothonotary or other proper officer with his freeholder's book; and the officer is to take indifferently forty-eight of the principal freeholders in the presence of the attorneys on both sides: who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel. By the statute 3 Geo. II., ch. 25, either party is entitled upon motion to have a special jury struck upon the trial of any issue, as well at the assizes as at bar; he paying the extraordinary expense, unless the judge will certify (in pursuance of the statute 24 Geo. II., ch. 18) that the cause required such special jury.

A common jury is one returned by the sheriff according to the direction of the statute 3 Geo. II., ch. 25, which appoints that the sheriff or officer shall not return a separate panel for every separate cause, as formerly; but one and the same panel for every cause to be tried at the same assizes containing not less

than forty-eight, nor more than seventy-two jurors; and that their names being written on tickets, shall be put into a box or glass: and when each cause is called, twelve of these persons, whose names shall be first drawn out of the box, shall be sworn upon the jury, unless absent, challenged, or excused: or unless a previous view of the messuages, lands, or place in question, shall have been thought necessary by the court: in which case six or more of the jurors returned, to be agreed on by the parties, or named by a judge or other proper officer of the court, shall be appointed by special writ of *habeas corpora* or *distringas* to have the matters in question shown to them by two persons named in the writ; and then such of the jury as have had the view, or so many of them as appear, shall be sworn on the inquest previous to any other jurors. These acts are well calculated to restrain any suspicion of partiality in the sheriff, or any tampering with the jurors when returned.

As the jurors appear, when called, they shall be sworn, unless *challenged* by either party. Challenges are of two sorts; challenges to the *array*, and challenges to the *polls*.²

Challenges to the array are at once an exception to the whole panel, in which the jury are arrayed or set in order by the sheriff in his return; and they may be made upon account of partiality or some default in the sheriff, or his under-officer who arrayed the panel. And generally speaking, the same reasons that before the awarding the *venire* were sufficient to have directed it to the coroners or elisors, will be also sufficient to quash the array, when made by a person or officer of whose partiality there is any tolerable ground of suspicion. Also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination, or under the direction of either party, this is good cause of challenge to the array. Also, by the policy of the ancient law, the jury was to come *de vicineto*, from the neighborhood of the vill or place where the cause of action was laid in the declaration: and therefore some of the jury were obliged to be returned from the hundred in which such vill lay; and, if none were returned, the array might be challenged for defect of hundredors. At length, this rule was entirely abolished upon all

² There are specific statutory regulations in the respective American States in regard to the selection and qualifications of jurors, challenges, etc. The statutes of any particular State must be consulted.

civil actions, except upon penal statutes; and upon those also by the 24 Geo. II., ch. 18, the jury being now only to come *de corpore comitatus*, from the body of the county at large, and not *de vicineto*, or from the particular neighborhood.

Challenges to the polls, *in capita*, are exceptions to particular jurors. They are reduced to four heads by Sir Edward Coke; *propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter delictum*.

1. *Propter honoris respectum*; as if a lord of parliament be empanelled on a jury, he may be challenged by either party, or he may challenge himself.

2. *Propter defectum*; as if a juror be an alien born, this is defect of birth; if he be a slave or bondman, this is defect of liberty, and he cannot be *liber et legalis homo*. Under the word *homo* also, though a name common to both sexes, the female is however excluded, *propter defectum sexus*: except when a widow feigns herself with child, in order to exclude the next heir, and a supposititious birth is suspected to be intended: then upon the writ *de ventre inspiciendo*, a jury of women is to be empanelled to try the question, whether with child or not. But the principal deficiency is defect of estate, sufficient to qualify him to be a juror.

3. Jurors may be challenged *propter affectum*, for suspicion of bias or partiality. This may be either a *principal* challenge, or *to the favor*. A *principal* challenge is such, where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favor; as that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be overruled, for jurors must be *omni exceptione majores*. Challenges *to the favor*, are where the party hath no principal challenge: but objects only some probable circumstances of suspicion, as acquaintance and the like; the validity of which must be left to the determination of *triors*, whose office it is to decide whether the juror be favorable or unfavorable. The *triors*, in case the

first man called be challenged, are two indifferent persons named by the court; and if they try one man and find him indifferent, he shall be sworn; and then he and the two triors shall try the next; and when another is found indifferent and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest.

4. Challenges *propter delictum*, are for some crime or misdemeanor, that affects the juror's credit and renders him infamous. As for a conviction of treason, felony, perjury, or conspiracy; or if for some infamous offence he hath received judgment of the pillory, tumbrel, or the like; or to be branded, whipped, or stigmatized; or if he be outlawed or excommunicated, or hath been attainted of false verdict, or forgery. A juror may himself be examined on oath of *voir dire*, *veritatem dicere*, with regard to such causes of challenge as are not to his dishonor or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage.

Besides these challenges, which are exceptions against the fitness of jurors, and whereby they may be *excluded* from serving, there are also other causes to be made use of by the jurors themselves, which are matter of exemption; whereby their service is *excused*, and not *excluded*. As by statute West. 2, 13 Edw. I., ch. 38, sick and decrepit persons, persons not commorant in the county, and men above seventy years old; and by the statute of 7 & 8 Wm. III., ch. 32, infants under twenty-one. This exemption is also extended by divers statutes, customs, and charters, to physicians and other medical persons, counsel, attorneys, officers of the courts, and the like; all of whom, if empanelled, must show their special exemption. Clergymen are also usually excused, out of favor and respect to their function: but, if they are seized of lands and tenements, they are in strictness liable to be empanelled in respect of their lay-fees, unless they be in the service of the king or of some bishop: "*in obsequio domini regis, vel alicujus episcopi.*"

If by means of challenges, or other cause, a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a *tales*. A *tales* is a supply of *such* men as are summoned upon the first panel, in order to make up the deficiency. For this purpose, a writ of *decem tales*, *octo tales*, and the like, was used to be issued to the sheriff at common law, and must be

still so done at a trial at bar, if the jurors make default. But at the assizes or *nisi prius*, by virtue of the statute 35 Hen. VIII., ch. 6, and other subsequent statutes, the judge is empowered at the prayer of either party, to award a *tales de circumstantibus*, of persons present in court, to be joined to the other jurors to try the cause ; who are liable, however, to the same challenges as the principal jurors. This is usually done, till the legal number of twelve be completed ; in which patriarchal and apostolical number Sir Edward Coke hath discovered abundance of mystery.

When a sufficient number of persons empanelled, or *tales-men*, appear, they are then separately sworn, well and truly to try the issue between the parties, and a true verdict to give according to the evidence ; and hence they are denominated the jury, *jurata*, and jurors, *sc. juratores*.

The jury are now ready to hear the merits ; and, to fix their attention the closer to the facts which they are empanelled and sworn to try, the pleadings are opened to them by counsel on that side which holds the affirmative of the question in issue. For the issue is said to lie, and proof is always first required upon that side which affirms the matter in question : in which our law agrees with the civil ; “ *ei incumbit probatio, qui dicit, non qui negat ; cum per rerum naturam factum-negantis probatio nulla sit.* ” The opening counsel briefly informs them what has been transacted in the court above ; the parties, the nature of the action, the declaration, the plea, replication, and other proceedings, and lastly, upon what point the issue is joined, which is there set down to be determined. Instead of which formerly the whole record and process of the pleadings was read to them in English by the court, and the matter in issue clearly explained to their capacities. The nature of the case, and the evidence intended to be produced, are next laid before them by counsel also on the same side : and when their evidence is gone through, the advocate on the other side opens the adverse case, and supports it by evidence ; and then the party which began is heard by way of reply.

The nature of my present design will not permit me to enter into the numberless niceties and distinctions of what is, or is not, legal *evidence* to a jury. I shall only therefore select a few of the general heads and leading maxims, relative to this point,

together with some observations on the manner of giving evidence.

And, first, evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other ; and no evidence ought to be admitted to any other point. Therefore upon an action of debt, when the defendant denies his bond by the plea of *non est factum*, and the issue is, whether it be the defendant's deed or no ; he cannot give a release of this bond in evidence : for that does not destroy the bond, and therefore does not prove the issue which he has chosen to rely upon, *viz.* that the bond has no existence.

Again ; evidence in the trial by jury is of two kinds, either that which is given in proof, or that which the jury may receive by their own private knowledge. The former or *proofs* (to which in common speech the name of evidence is usually confined), are either written, or *parol*, that is, by word of mouth. Written proofs, or evidence, are, 1. Records, and 2. Ancient deeds of thirty years' standing, which prove themselves ; but 3. Modern deeds, and 4. Other writings, must be attested and verified by *parol* evidence of witnesses. And the one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had ; but if not possible, then the best evidence that can be had shall be allowed. For if it be found that there is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed. Thus, in order to prove a lease for years, nothing else shall be admitted but the very deed of lease itself, if in being : but if that be positively proved to be burnt or destroyed (not relying on any loose negative, as that it cannot be found, or the like), then an attested copy may be produced ; or *parol* evidence be given of its contents. So, no evidence of a discourse with another will be admitted, but the man himself must be produced ; yet in some cases (as in proof of any general customs, or matters of common tradition or repute), the courts admit of *hearsay* evidence, or an account of what persons deceased have declared in their lifetime : but such evidence will not be received of any particular facts. So too, books of account, or shop-books, are not allowed of themselves to be

given in evidence for the owner ; but a servant who made the entry may have recourse to them to refresh his memory ; and, if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence : for as tradesmen are often under a necessity of giving credit without any note or writing, this is therefore, when accompanied with such other collateral proofs of fairness and regularity, the best evidence that can then be produced. However, this dangerous species of evidence is not carried so far in England as abroad ; where a man's own books of accounts, by a distortion of the civil law (which seems to have meant the same thing as is practised with us) with the suppletory oath of the merchant, amount at all times to full proof.⁸

With regard to *parol* evidence, or *witnesses* ; it must first be remembered, that there is a process to bring them in by writ of *subpœna ad testificandum* : which commands them, laying aside all pretences and excuses, to appear at the trial on pain of 100*l.* to be forfeited to the king ; to which the statute 5 Eliz., ch. 9, has added a penalty of 20*l.* to the party aggrieved, and damages equivalent to the loss sustained by want of his evidence. But no witness, unless his reasonable expenses be tendered him, is bound to appear at all ; nor, if he appears, is he bound to give evidence till such charges are actually paid him ; except he resides within the bills of mortality, and is summoned to give

⁸ The admission of a party's own shop-books, in proof of the delivery of goods therein charged, the entries having been made by his clerk, is governed by these principles : "The books must have been kept for the purpose, and the entries must have been made contemporaneous with the delivery of the goods, and by the person whose duty it was, for the time being, to make them. In such cases, the books are held admissible, as evidence of the delivery of the goods therein charged, where the nature of the subject is such as not to render better evidence attainable. In the United States, this principle has been carried farther, and extended to *entries made by the party himself*, in his own shop-books. Though this evidence has sometimes been said to be admitted, contrary to the rules of the common-law, yet, in general, its admission will be found in perfect harmony with those rules, the entry being admitted, where it was evidently contemporaneous with the fact, and part of the *res gestæ*, [*i. e.*, transaction.] Being the act of the party himself, it is received with greater caution ; but still it may be seen and weighed by the jury." (Greenleaf on Evidence § 118.) In some States, statutes have been passed authorizing the introduction of a party's own books as evidence, under certain restrictions. (See 18 Wall. 516 ; 88 N. Y. 334 ; 132 Mass. 477 ; 47 Conn. 431.)

evidence within the same. This compulsory process, is to bring in unwilling witnesses, and the additional terrors of an attachment in case of disobedience, are of excellent use in the thorough investigation of truth.

All witnesses, of whatever religion or country, that have the use of their reason, are to be received and examined, except such as are *infamous*, or such as are *interested* in the event of the cause.⁴ All others are *competent* witnesses; though the jury from other circumstances will judge of their *credibility*. Infamous persons are such as may be challenged as jurors, *propter delictum*; and therefore never shall be admitted to give evidence to inform that jury, with whom they were too scandalous to associate. Interested witnesses may be examined upon a *voir dire*, if suspected to be secretly concerned in the event; or their interest may be proved in court. Which last is the only method of supporting an objection to the former class: for no man is to be examined to prove his own infamy. And no counsel, attorney, or other person, intrusted with the secrets of the cause by the party himself shall be compelled, or perhaps allowed, to give evidence of such conversation or matters of privacy, as came to his knowledge by virtue of such trust and confidence: but he may be examined as to mere matters of fact, as the execution of a deed or the like, which might have come to his knowledge without being interested in the cause.

One witness (if credible) is *sufficient* evidence to a jury of any single fact, though undoubtedly the concurrence of two or more corroborates the proof. Yet our law considers that there are many transactions to which only one person is privy; and therefore does not *always* demand the testimony of two, as the civil law universally requires.⁵

Positive proof is always required, where from the nature of the case it appears it might possibly have been had. But next to *positive* proof, *circumstantial* evidence or the doctrine of *presumptions* must take place; for when the fact itself cannot be

⁴ The disability of pecuniary interest in the event of the cause has been removed by statute in England, and generally in the States of this country; and parties thus interested are declared not only competent but compellable to give testimony. The credibility of such testimony is to be determined by the jury in each special case.

⁵ It is a general rule in civil cases that no more than one witness is necessary. But in some States it is the usual practice not to grant a divorce on the uncorroborated testimony of the complainant, or the uncorroborated confession of the defendant. (100 Mass. 150; 42 Hun, 524; 67 Cal. 24.) In some other civil cases, also, corroboration is required in some States. (100 Ill. 385; 125 U. S. 247; 52 Wis. 337.)

demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances which either *necessarily* or *usually*, attend such facts; and these are called presumptions, which are only to be relied upon till the contrary be actually proved. *Stabitur præsumptioni donec probetur in contrarium.* Violent presumption is many times equal to full proof; for there those circumstances appear, which *necessarily* attend the fact. As if a landlord sues for rent due at Michaelmas, 1754, and the tenant cannot prove the payment, but produces an acquittance for rent due at a subsequent time, in full of all demands, this is a violent presumption of his having paid the former rent, and is equivalent to full proof; for though the actual payment is not proved, yet the acquittance in full of all demands is proved, which could not be without such payment; and it therefore induces so forcible a presumption, that no proof shall be admitted to the contrary.⁶

Probable presumption, arising from such circumstances as *usually* attend the fact, hath also its due weight: as if, in a suit for rent due in 1754, the tenant proves the payment of the rent due in 1755; this will prevail to exonerate the tenant, unless it be clearly shown that the rent of 1754 was retained for some special reason, or that there was some fraud or mistake: for otherwise it will be presumed to have been paid before that in 1755, as it is most usual to receive first the rents of longest standing. *Light*, or rash, presumptions have no weight or validity at all.

The oath administered to the witness is not only that what he deposes shall be true, but that he shall also depose the *whole* truth: so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all bystanders, and before the judge and jury: each party having liberty to except to its competency, which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country: which must curb any secret bias or partiality that might arise in his own breast. And

⁶ But it is a well established rule that a receipt only amounts to an admission of payment of the debt, and it may be explained or contradicted by parol evidence. (15 Johns. 478; 48 N. Y. 204; 59 N. H. 548.) A receipt in full may, however, operate as a discharge of a debt, or an accord and satisfaction. (54 Conn. 444; 56 Vt. 209; 8 N. Y. 402.)

if, either in his directions or decisions, he mistakes the law by ignorance, inadvertence, or design, the counsel on either side may require him publicly to seal a *bill of exceptions*; stating the point wherein he is supposed to err: and this he is obliged to seal by statute Westm. 2, 13 Ed. I., ch. 31, or, if he refuses so to do, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated: and if he returns that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. This bill of exceptions is in the nature of an appeal, examinable, not in the court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court, upon a writ of error, after judgment given in the court below. But a *demurrer* to evidence shall be determined by the court, out of which the record is sent. This happens, where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law: in which case the adverse party may, if he pleases, demur to the whole evidence; which admits the truth of every fact that has been alleged, but denies the sufficiency of them all in point of law to maintain or overthrow the issue; which draws the question of law from the cognizance of the jury, to be decided (as it ought) by the court. But neither these demurrers to evidence, nor the bills of exceptions, are at present so much in use as formerly; since the more frequent extension of the discretionary powers of the court in granting a new trial, which is now very commonly had for the misdirection of a judge at *nisi prius*.

When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence.

The jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of their verdict; and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. If our juries eat or drink at all, or have any eatables about them, without

consent of the court, and before verdict, it is finable ; and if they do so at his charge for whom they afterwards find, it will set aside the verdict. Also if they speak with either of the parties or their agents, after they are gone from the bar ; or if they receive any fresh evidence in private ; or if to prevent disputes they cast lots for whom they shall find ; any of these circumstances will entirely vitiate the verdict. And it has been held, that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart.⁷ This necessity of a total unanimity seems to be peculiar to our own constitution ; or, at least in the *nembda* or jury of the ancient Goths, there was required (even in criminal cases) only the consent of the major part ; and in case of an equality, the defendant was held to be acquitted.

When they are all unanimously agreed, the jury return back to the bar ; and, before they deliver their verdict, the plaintiff is bound to appear in court, by himself, attorney, or counsel, in order to answer the amercement to which by the old law he is liable, as has been formerly mentioned, in case he fails in his suit, as a punishment for his false claim. To be *amrcced*, or a *mercie*, is to be at the king's mercy with regard to the fine to be imposed ; *in misericordia domini regis pro falso clamore suo*. The amercement is disused, but the form still continues ; and if the plaintiff does not appear, no verdict can be given, but the plaintiff is said to be *nonsuit*, *non sequitur clamorem suum*. Therefore it is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or withdraw himself : whereupon the crier is ordered to *call the plaintiff* : and if neither he, nor anybody for him, appears, he is nonsuited, the jurors are discharged, the action is at an end, and the defendant shall recover his costs. The reason of this practice is, that a nonsuit is more eligible for the plaintiff, than a verdict against him : for after a nonsuit, which is only a default, he may commence the same suit again

⁷ These rules in regard to the treatment of jurors have been to a considerable extent changed by modern statutes. Such harsh measures as depriving them of food, fire, and other necessary comforts, are no longer thought necessary or reasonable. (See 2 Johns. Cas. 301.) When it satisfactorily appears that jurors cannot agree upon a verdict, the modern practice is to discharge them and then a new trial may be had. It has been doubted in a modern English case whether jurors were ever carted from town to town. (6 B. & S. 143; see 120 Ind. 124; 121 Pa. St. 109.)

for the same cause of action ; but after a verdict had, and judgment consequent thereupon, he is for ever barred from attacking the defendant upon the same ground of complaint. But, in case the plaintiff appears, the jury by their foreman deliver in their verdict.

A verdict, *vere dictum*, is either *privy*, or *public*. A *privy* verdict is when the judge hath left or adjourned the court : and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court : which *privy* verdict is of no force, unless afterwards affirmed by a public verdict given openly in court ; wherein the jury may, if they please, vary from the *privy* verdict. So that the *privy* verdict is indeed a mere nullity ; and yet it is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged. But the only effectual and legal verdict is the *public* verdict : in which they openly declare to have found the issue for the plaintiff, or for the defendant ; and if for the plaintiff, they assess the damages also sustained by the plaintiff, in consequence of the injury upon which the action is brought.

Sometimes, if there arises in the case any difficult matter of law, the jury, for the sake of better information, and to avoid the danger of having their verdict attainted, will find a *special* verdict ; which is grounded on the statute of Westm. 2, 13 Edw. I., ch. 30, § 2. And herein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon ; concluding conditionally, that if upon the whole matter the court should be of opinion that the plaintiff had cause of action, they then find for the plaintiff ; if otherwise, then for the defendant. This is entered at length on the record and afterwards argued and determined in the court at Westminster, from whence the issue came to be tried.

Another method of finding a species of special verdict, is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judge or the court above, on a *special case* stated by the counsel on both sides with regard to a matter of law : which has this advantage over a special verdict, that it is attended with much less expense, and obtains a much speedier decision : the *postea* (of which in the next chapter) being stayed in the hands of the officer of *nisi prius*, till

the question is determined, and the verdict is then entered for the plaintiff or defendant, as the case may happen. But, as nothing appears upon the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the judgment of the court or judge upon the point of law. Which makes it a thing to be wished, that a method could be devised of either lessening the expense of special verdicts, or else of entering the cause at length upon the *postea*. But in both these instances the jury may, if they think proper, take upon themselves to determine, at their own hazard, the complicated question of fact and law ; and, without either special verdict or special case, may find a verdict absolutely either for the plaintiff or defendant.

When the jury have delivered in their verdict, and it is recorded in court, they are then discharged. And so ends the trial by jury : a trial which, besides the other vast advantages which we have occasionally observed in its progress, is also as expeditious and cheap, as it is convenient, equitable, and certain ; for a commission out of chancery, or the civil law courts, for examining witnesses in one cause will frequently last as long, and of course be full as expensive, as the trial of a hundred issues at *nisi prius* : and yet the fact cannot be determined by such commissioners at all ; no, not till the depositions are published, and read at the hearing of the cause in court.

CHAPTER XIX.

[BL. COMM.—BOOK III. CH. XXIV.]

Of Judgment and its Incidents.

IN the present chapter we are to consider the transactions in a cause, next immediately subsequent to arguing the demurrer, or trial of the issue.

If the issue be an issue of fact ; and, upon trial by any of the methods mentioned in the preceding chapters, it be found for either the plaintiff or defendant, or specially ; or if the plain-

tiff makes default, or is nonsuit ; or whatever, in short, is done subsequent to the joining of issue and awarding the trial, it is entered on record, and is called a *postea*. The substance of which is, that *postea*, afterwards, the said plaintiff and defendant appeared by their attorneys at the place of trial ; and a jury, being sworn, found such a verdict ; or, that the plaintiff, after the jury sworn, made default, and did not prosecute his suit ; or, as the case may happen. This is added to the roll, which is now returned to the court from which it was sent ; and the history of the cause, from the time it was carried out, is thus continued by the *postea*.

Next follows, *sixthly*, the judgment of the court upon what has previously passed ; both the matter of law and matter of fact being now fully weighed and adjusted. Judgment may however for certain causes be *suspended*, or finally *arrested* : for it cannot be entered till the next term after trial had, and that upon notice to the other party. So that if any defect of justice happened at the trial, by surprise, inadvertence, or misconduct, the party may have relief in the court above, by obtaining a new trial ; or if, notwithstanding the issue of fact be regularly decided, it appears that the complaint was either not actionable in itself, or not made with sufficient precision and accuracy, the party may supersede it by arresting or staying the judgment.

1. Causes of *suspending* the judgment, by granting a *new trial* are at present wholly *extrinsic*, arising from matter foreign to, or *dehors* the record. Of this sort are want of notice of trial ; or any flagrant misbehavior of the party prevailing towards the jury, which may have influenced their verdict ; or any gross misbehavior of the jury among themselves : also if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith ; or if they have given exorbitant damages ; or if the judge himself has misdirected the jury, so that they found an unjustifiable verdict : for these, and other reasons of the like kind, it is the practice of the court to award a *new*, or second, *trial*. But if two juries agree in the same or a similar verdict, a third trial is seldom awarded : for the law will not readily suppose, that the verdict of any one subsequent jury can countervail the oaths of the two preceding ones.

Next to doing right, the great object in the administration of

public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of by-standers, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive ; he would arraign the determination as manifestly unjust ; and abhor a tribunal which he imagined had done him an injury without a possibility of redress.

Granting a new trial, under proper regulations, cures all these inconveniences, and at the same time preserves entire and renders perfect that most excellent method of decision, which is the glory of the English law. A new trial is a rehearing of the cause before another jury ; but with as little prejudice to either party, as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of court for awarding such second trial on the other : and the subsequent verdict, though contrary to the first, imports no tittle of blame upon the former jury ; who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject ; and nothing is now tried but the real merits of the case.

A sufficient ground must however be laid before the court, to satisfy them that it is necessary to justice that the cause should be farther considered. If the matter be such, as did not or could not appear to the judge who presided at *nisi prius*, it is disclosed to the court by *affidavit* : if it arises from what passed at the trial, it is taken from the judge's information ; who usually makes a special and minute report of the evidence. Counsel are heard on both sides to impeach or establish the verdict, and the court give their reasons at large why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colors are taken off, and all points of law which arose at the trial are upon full deliberation clearly explained and settled.

Nor do the courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied, that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case. A new trial is not granted, where the value is too inconsiderable to merit a second examination. It is not granted upon nice and formal objections

which do not go to the real merits. It is not granted in cases of strict right or *summum jus*, where the rigorous exaction of extreme legal justice is hardly reconcilable to conscience. Nor is it granted where the scales of evidence hang nearly equal: that which leans against the former verdict ought always very strongly to preponderate.

2. Arrests of judgment arise from *intrinsic* causes, appearing upon the face of the record. Of this kind are, first, where the declaration varies totally from the original writ; as where the writ is in debt or detinue, and the plaintiff declares in an action on the case for an *assumpsit*: for, the original writ out of chancery being the foundation and warrant of the whole proceedings in the common pleas, if the declaration does not pursue the nature of the writ, the court's authority totally fails. Also, secondly, where the verdict materially differs from the pleadings and issue thereon; as if, in an action for words, it is laid in the declaration that the defendant said, "the plaintiff *is* a bankrupt;" and the verdict finds specially that he said, "the plaintiff *will be* a bankrupt." Or, thirdly, if the case laid in the declaration is not sufficient in point of law to found an action upon. And this is an invariable rule with regard to arrests of judgment upon matter of law, "that whatever is alleged in arrest of judgment must be such matter, as would upon demurrer have been sufficient to overturn the action or plea." As if, on an action for slander in calling the plaintiff a Jew, the defendant denies the words, and issue is joined thereon; now, if a verdict be found for the plaintiff, that the words were actually spoken, whereby the fact is established, still the defendant may move in arrest of judgment, that to call a man a Jew is not actionable: and, if the court be of that opinion, the judgment shall be arrested, and never entered for the plaintiff. But the rule will not hold *e converso* "that everything that may be alleged as cause of demurrer will be good in arrest of judgment;" for if a declaration or plea omits to state some particular circumstance, without proving of which, at the trial, it is impossible to support the action or defence, this omission shall be aided by a verdict. As if, in an action of trespass, the declaration doth not allege that the trespass was committed on any certain day; or if the defendant justifies, by prescribing for a right of common for his cattle, and does not plead that his cattle were *levant* and *couchant* on the land; though

either of these defects might be good cause to demur to the declaration or plea, yet if the adverse party omits to take advantage of such omission in due time, but takes issue, and has a verdict against him, these exceptions cannot after verdict be moved in arrest of judgment. For the verdict ascertains those facts, which before from the inaccuracy of the pleadings might be dubious ; since the law will not suppose, that a jury under the inspection of a judge, would find a verdict for the plaintiff or defendant, unless he had proved those circumstances, without which his general allegation is defective. Exceptions, therefore, that are moved in arrest of judgment, must be much more material and glaring than such as will maintain a demurrer : or, in other words, many inaccuracies and omissions, which would be fatal, if early observed, are cured by a subsequent verdict ; and not suffered, in the last stage of a cause, to unravel the whole proceedings. But if the thing omitted be essential to the action or defense, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is totally defective in itself, or if to an action of debt the defendant pleads *not guilty*, instead of *nil debet*, these cannot be cured by a verdict for the plaintiff in the first case, or for the defendant in the second.

If, by the misconduct or inadvertence of the pleaders, the issue be joined on a fact totally immaterial, or insufficient to determine the right, so that the court upon the finding cannot know for whom judgment ought to be given ; as if, in an action on the case in *assumpsit* against an executor, he pleads that he himself (instead of the testator) made no such promise : or if, in an action of debt on bond conditioned to pay money *on or before* a certain day, the defendant pleads payment *on* the day : (which issue, if found for the plaintiff, would be inconclusive, as the money might have been paid *before*) ; in these cases the court will after verdict award a *repleader*, *quod partes replacitent* ; unless it appears from the whole record that nothing material can possibly be pleaded in any shape whatsoever, and then a repleader would be fruitless. And, whenever a repleader is granted, the pleadings must begin *de novo* at that stage of them, whether it be the plea, replication, or rejoinder, &c., wherein there appears to have been the first defect, or deviation from the regular course.

If judgment is not by some of these means arrested within the

first four days of the next term after the trial, it is then to be entered on the roll or record. Judgments are the sentence of the law, pronounced by the court upon the matter contained in the record ; and are of four sorts. First, where the facts are confessed by the parties, and the law determined by the court ; as in case of judgment upon *demurrer* : secondly, where the law is admitted by the parties, and the facts disputed ; as in the case of judgment on a *verdict* : thirdly, where both the fact and the law arising thereon are admitted by the defendant ; which is the case of judgments by a *confession* or *default* : or, lastly, where the plaintiff is convinced that either fact, or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution ; which is the case in judgments upon a *nonsuit* or *retraxit*.

The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of *the law*. It is the conclusion that naturally and regularly follows from the premises of law and fact, which stands thus : against him, who hath rode over my corn, I may recover damages by law : but A. hath rode over my corn ; therefore I shall recover damages against A. If the major proposition be denied, this is a demurrer in law ; if the minor, it is then an issue of fact : but if both be confessed (or determined) to be right, the conclusion or judgment of the court cannot but follow. Which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. The judgment, in short, is the remedy prescribed by law for the redress of injuries ; and the suit or action is the vehicle or means of administering it. What that remedy may be, is indeed the result of deliberation and study to point out, and therefore the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own ; but, "it is considered," *consideratum est per curiam*, that the plaintiff do recover his damages, his debt, his possession, and the like : which implies that the judgment is none of their own ; but the act of law, pronounced and declared by the court, after due deliberation and inquiry.

All these species of judgments are either *interlocutory* or *final*. *Interlocutory* judgments are such as are given in the middle of a cause upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the

suit. Of this nature are all judgments for the plaintiff upon pleas in abatement of the suit or action : in which it is considered by the court, that the defendant do answer over, *respondeat ouster* ; that is, put in a more substantial plea. It is easy to observe, that the judgment here given is not final, but merely interlocutory ; for there are afterwards farther proceedings to be had, when the defendant has put in a better answer.

But the interlocutory judgments, most usually spoken of, are those incomplete judgments, whereby the *right* of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained : which is a matter that cannot be done without the intervention of a jury. This can only happen where the plaintiff recovers ; for, when judgment is given for the defendant, it is always complete as well as final. And this happens, in the first place, where the defendant suffers judgment to go against him by default, or *nihil dicit* ; as if he puts in no plea at all to the plaintiff's declaration ; by confession or *cognovit actionem*, where he acknowledges the plaintiff's demand to be just ; or by *non sum informatus*, when the defendant's attorney declares he has no instruction to say anything in answer to the plaintiff, or in defence of his client ; which is a species of judgment by default. If these, or any of them, happen in actions where the specific thing sued for is recovered, as in actions of debt for a sum certain, the judgment is absolutely complete. And therefore it is very usual, in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to some attorney named by the creditor, empowering him to confess a judgment by either of the ways just now mentioned (by *nihil dicit*, *cognovit actionem*, or *non sum informatus*) in an action of debt to be brought by the creditor against the debtor for the specific sum due : which judgment, when confessed, is absolutely complete and binding ; provided the same (as is also required in all other judgments) be regularly *docquetted*, that is, abstracted and entered in a book, according to the directions of statute 4 & 5 W. & M., ch. 20. But, where damages are to be recovered, a jury must be called in to assess them ; unless the defendant, to save charges, will confess the whole damages laid in the declaration : otherwise the entry of the judgment is, "that the plaintiff ought to recover his damages (indefinitely), but because the court know not what damages the said plaintiff hath sustained, therefore the sheriff is

commanded, that by the oaths of twelve honest and lawful men he inquire into the said damages, and return such inquisition into court." This process is called a *writ of inquiry*; in the execution of which the sheriff sits as judge, and tries by a jury, subject to nearly the same laws and conditions as the trial by jury at *nisi prius*, what damages the plaintiff hath really sustained; and when their verdict is given, which must assess *some* damages, the sheriff returns the inquisition, which is entered upon the roll in manner of a *postea*; and thereupon it is considered, that the plaintiff do recover the exact sum of the damages so assessed. In like manner, when a demurrer is determined for the plaintiff upon an action wherein damages are recovered, the judgment is also incomplete, without the aid of a writ of inquiry.

Final judgments are such as at once put an end to the action, by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. In which case, if the judgment be for the plaintiff, it is also considered that the defendant be either amerced, for his wilful delay of justice in not immediately obeying the king's writ by rendering the plaintiff his due; or be taken up, *capitur*, till he pays a fine to the king for the public misdemeanor which is coupled with the private injury, in all cases of force, of falsehood in denying his own deed, or unjustly claiming property in replevin, or of contempt in disobeying the command of the king's writ or the express prohibition of any statute. But now in case of trespass, ejectment, assault, and false imprisonment, it is provided by the statute 5 & 6 W. & M., ch. 12, that no writ of *capias* shall issue for this fine, nor any fine be paid: but the plaintiff shall pay 6s. 8d. to the proper officer, and be allowed it against the defendant among his other costs. And therefore upon such judgments in the common pleas they used to enter that the fine was remitted, and now in both courts they take no notice of any fine or *capias* at all. But if judgment be for the defendant, then in case of fraud and deceit to the court, or malicious or vexatious suits, the plaintiff may also be fined; but in most cases it is only considered, that he and his pledges of prosecuting be (nominally) amerced for his false claim, *pro falso clamore suo*, and that the defendant may go thereof without a day, *eat inde sine die*, that is, without any further continuance or adjournment; the king's writ com-

manding his attendance, being now fully satisfied, and his innocence publicly cleared.

Thus much for judgments ; to which costs are a necessary appendage ; it being now as well the maxim of ours as of the civil law, that “ *victus victori in expensis condemnandus est* ;” though the common law did not professedly allow any, the amercement of the vanquished party being his only punishment.

After judgment is entered, *execution* will immediately follow, unless the party condemned thinks himself unjustly aggrieved by any of these proceedings, and then he has his remedy to reverse them by several writs in the nature of appeals, which we shall consider in the succeeding chapter.

CHAPTER XX.

[BL. COMM.—BOOK III. CH. XXV.]

Of Proceedings in the Nature of Appeals.

THE principal method of redress for erroneous judgments in the king's court of record, is by *writ of error* to some superior court of appeal.

A writ of error lies for some supposed mistake in the proceedings of a court of record ; for to amend errors in a base court, not of record, a writ of *false judgment* lies. The writ of error only lies upon matter of *law* arising upon the face of the proceedings ; so that no evidence is required to substantiate or support it ; there being no method of reversing an error in the determination of *facts*, but by an attain, or a new trial, to correct the mistakes of the former verdict.

Formerly the suitors were much perplexed by writs of error brought upon very slight and trivial grounds, as mis-spelling and other mistakes of the clerks, all which might be amended at the common law, while all the proceedings were in *paper* ; for they were then considered as only *fieri*, and therefore subject to the control of the courts. But, when once the record was made up, it was formerly held, that by the common law no amendment could be permitted, unless within the very terms in which the

judicial act so recorded was done ; for during the term the record is in the breast of the court ; but afterwards it admitted of no alteration. But now the courts are become more liberal ; and, where justice requires it, will allow of amendments at any time while the suit is depending, notwithstanding the record be made up, and the term be past. For they at present consider the proceedings as in *feri*, till judgment is given ; and therefore that, till then, they have power to permit amendments by the common law ; but when judgment is once given and enrolled, no amendment is permitted in any subsequent term. Mistakes are also effectually helped by the statutes of amendments and *jeofails* ; so called, because when a pleader perceives any slip in the form of his proceedings, and acknowledges such error (*jeo faile*), he is at liberty by those statutes to amend it ; which amendment is seldom actually made, but the benefit of the acts is attained by the court's overlooking the exception. These statutes are many in number, and the provisions in them too minute to be here taken notice of, otherwise than by referring to the statutes themselves ; by which all trifling exceptions are so thoroughly guarded against, that writs of error cannot now be maintained, but for some material mistake assigned.

A writ of error lies from the inferior courts of record in England into the king's bench, and not into the common pleas.¹ Also from the king's bench in Ireland to the king's bench in England. It likewise may be brought from the common pleas at Westminster to the king's bench ; and then from the king's bench the cause is removable to the House of Lords. From proceedings on the law side of the exchequer a writ of error lies into the court of exchequer chamber before the lord chancellor, lord treasurer, and the judges of the court of king's bench and common pleas ; and from thence it lies to the House of Peers. From proceedings in the king's bench, in debt, detinue, covenant, account, case, ejectment, or trespass, originally begun therein by bill (except where the king is party), it lies to the exchequer chamber, before the justices of the common pleas and barons of the exchequer ; and from thence also to the House of Lords ; but where the proceedings in the king's bench do not first commence therein by bill, but by

¹ But the practice was afterwards changed so that error lay from either of the three superior courts of law to the Exchequer Chamber, and thence to the House of Lords. Appeals are now taken to the Court of Appeal.

original writ sued out of chancery, this takes the case out of the general rule laid down by the statute ; so that the writ of error then lies, without any intermediate state of appeal, directly to the House of Lords, the dernier resort for the ultimate decision of every civil action. Each court of appeal, in their respective stages, may, upon hearing the matter of law in which the error is assigned, reverse or affirm the judgment of the inferior courts, but none of them are final, save only the House of Peers, to whose judicial decisions all other tribunals must therefore submit, and conform their own. And thus much for the reversal or affirmance of judgments at law, by writs in the nature of appeals.

CHAPTER XXI.

[BL. COMM.—BOOK III. CH. XXVI.]

Of Execution.

IF the regular judgment of the court, after the decision of the suit, be not suspended, superseded, or reversed, by one or other of the methods mentioned in the two preceding chapters the next and last step is the *execution* of that judgment ; or putting the sentence of the law in force. This is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered.

If the plaintiff recovers in an action real or mixed, whereby the seizin or possession of land is awarded to him, the writ of execution shall be an *habere facias seisinam*, or writ of seizin, of a freehold ; or an *habere facias possessionem*, or writ of possession of a chattel interest. These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land so recovered ; in the execution of which the sheriff may take with him the *posse comitatus*, or power of the county ; and may justify breaking open doors, if the possession be not quietly delivered. But, if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of the door in the name of seizin, is sufficient execution of the writ.

In actions where the judgment is that something is special be done or rendered by the defendant, then, in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff, according to the nature of the case. As upon an assize of nuisance, or *quod permittat prosternere*, where one part of the judgment is *quod nocumentum amoveatur*, a writ goes to the sheriff to abate it at the charge of the party, which likewise issues even in case of an indictment. Upon a replevin, the writ of execution is the writ *de retorno habendo*. In detinue, after judgment, the plaintiff shall have a *distringas*, to compel the defendant to deliver the goods, by repeated distresses of his chattels : or else a *scire facias* against any third person in whose hands they may happen to be, to show cause why they should not be delivered : and if the defendant still continues obstinate, then (if the judgment hath been by default or on demurrer) the sheriff shall summon an inquest to ascertain the value of the goods, and the plaintiff's damages ; which (being either so assessed, or by the verdict in case of an issue) shall be levied on the person or goods of the defendant. So that, after all, in replevin and detinue (the only actions for recovering the specific possession of personal chattels), if the wrongdoer be very perverse, he cannot be compelled to a restitution of the identical thing taken or detained ; but he still has his election, to deliver the goods, or their value : an imperfection in the law, that results from the nature of personal property, which is easily concealed or conveyed out of the reach of the justice, and not always amenable to the magistrate.

Executions in actions where money only is recovered, as a debt or damages (and not any specific chattel), are of five sorts : either against the body of the defendant ; or against his goods and chattels ; or against his goods and the *profits* of his lands ; or against his goods and the *possession* of his lands ; or against all three, his body, lands, and goods.

1. The first of these species of execution, is by writ of *capias ad satisfaciendum* ; which addition distinguishes it from the former *capias ad respondendum*, which lies to compel an appearance at the beginning of a suit. And, properly speaking, this cannot be sued out against any but such as were liable to be taken upon the former *capias*. The intent of it is, to imprison the body of the debtor till satisfaction be made for the debt, costs, and dam

ages ; it therefore doth not lie against any privileged persons, peers, or members of parliament, nor against executors or administrators, nor against such other persons as could not be originally held to bail. And Sir Edward Coke also gives us a singular instance, where a defendant in 14 Edw. III., was discharged from a *capias*, because he was of so advanced an age, *quod pœnam imprisonmenti subire non potest*. If an action be brought against a husband and wife for the debt of the wife, when sole, and the plaintiff recovers judgment, the *capias* shall issue to take both husband and wife in execution : but, if the action was originally brought against herself, when sole, and pending the suit she marries, the *capias* shall be awarded against her only, and not against her husband. Yet, if judgment be recovered against a husband and wife for the contract, nay, even for the personal misbehavior of the wife during her coverture, the *capias* shall issue against the husband only : which is one of the many great privileges of English wives.

The writ of *capias ad satisfaciendum* is an execution of the highest nature, inasmuch as it deprives a man of his liberty, till he makes the satisfaction awarded ; and therefore, when a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods. Only by statute 21 Jac. I., ch. 24, if the defendant dies, while charged in execution upon this writ, the plaintiff may, after his death, sue out a new execution against his lands, goods, or chattels. The writ is directed to the sheriff, commanding him to take the body of the defendant and have him at Westminster on a day therein named, to make the plaintiff satisfaction for his demand. And, if he does not then make satisfaction, he must remain in custody till he does. This writ may be sued out, as may all other executory process, for costs, against a plaintiff as well as a defendant, when judgment is had against him.

When a defendant is once in custody upon this process, he is to be kept in *arcta et salva custodia* ; and if he be afterwards seen at large, it is an *escape* ; and the plaintiff may have an action thereupon against the sheriff for his whole debt. For though, upon arrests, and what is called *mesne* process, being such as intervenes between the commencement and end of a suit, the sheriff, till the statute 8 & 9 Wm. III., ch. 27, might have indulged the defendant as he pleased, so as he produced him in court

to answer the plaintiff at the return of the writ : yet, upon a taking in execution, he could never give any indulgence ; for, in that case, confinement is the whole of the debtor's punishment, and of the satisfaction made to the creditor. Escapes are either voluntary, or negligent. Voluntary are such as are by the express consent of the keeper ; after which he never can retake his prisoner again (though the plaintiff may retake him at any time,) but the sheriff must answer for the debt. Negligent escapes are where the prisoner escapes without his keeper's knowledge or consent ; and then upon fresh pursuit the defendant may be retaken, and the sheriff shall be excused, if he has him again before any action brought against himself for the escape. A rescue of a prisoner *in execution*, either going to gaol or in gaol, or a breach of prison, will not excuse the sheriff from being guilty of and answering for the escape ; for he ought to have sufficient force to keep him, since he may command the power of the county.

If a *capias ad satisfaciendum* is sued out, and a *non est inventus* is returned thereon, the plaintiff may sue out a process against the bail, if any were given : who, we may remember, stipulated in this triple alternative, that the defendant should, if condemned in the suit, satisfy the plaintiff his debt and costs ; or that he should surrender himself a prisoner or that they would pay it for him : as therefore the two former branches of the alternative are neither of them complied with, the latter must immediately take place. In order to which a writ of *scire facias* may be sued out against the bail, commanding them to show cause why the plaintiff should not have execution against them for his debt and damages : and on such writ, if they show no sufficient cause, or the defendant does not surrender himself on the day of the return, or of showing cause (for afterwards is not sufficient), the plaintiff may have judgment against the bail, and take out a writ of *capias ad satisfaciendum* or other process of execution against them.

2. The next species of execution is against the goods and chattels of the defendant, and is called a writ of *fiery facias*, from the words in it where the sheriff is commanded, *quod fieri faciat de bonis*, that he cause to be made of the goods and chattels of the defendant the sum or debt recovered. This lies as well against privileged persons, peers, &c. as other common persons ; and against executors or administrators with regard to the goods of the deceased. The sheriff may not break open any outer

doors, to execute either this, or the former writ : but must enter peaceably ; and may then break open any inner door, belonging to the defendant, in order to take the goods. And he may sell the goods and chattels (even an estate for years, which is a chattel real) of the defendant, till he has raised enough to satisfy the judgment and costs ; first paying the landlord of the premises, upon which the goods are found, the arrears of rent then due, not exceeding one year's rent in the whole. If part only of the debt be levied on a *feri facias*, the plaintiff may have a *capias ad satisfaciendum* for the residue.¹

3. A third species of execution is by the writ of *levari facias* ; which affects a man's goods and the *profits* of his lands, by commanding the sheriff to levy the plaintiff's debt on the lands and goods of the defendant : whereby the sheriff may seize all his goods, and receive the rents and profits of his lands, till satisfaction be made to the plaintiff. Little use is now made of this writ ; the remedy by *elegit* which takes possession of the lands themselves, being much more effectual.

4. The fourth species of execution is by the writ of *elegit* ; which is a judicial writ given by the statute Westm. 2, 13 Edw. I., ch. 18, either upon a judgment for a debt, or damages ; or upon the forfeiture of a recognizance taken in the king's court. By the common law a man could only have satisfaction of goods, chattels, and the present profits of lands, by the two last mentioned writs of *feri facias*, or *levari facias* ; but not the possession of the lands themselves ; which was a natural consequence of the feudal principles, which prohibited the alienation, and of course the incumbering of the fief with the debts of the owner.

¹ The writs of execution commonly in use in the United States, are the writ of *feri facias* (usually termed a *fi. fa.*), by which the sheriff is directed to levy upon the debtor's goods and chattels, and the writ of *capias ad satisfaciendum* (usually termed a *ca. sa.*) which commands the sheriff to take the defendant into custody and confine him until the judgment is satisfied. In some States, special writs of execution have been established by statute ; but they closely resemble, in their scope and effect, those which existed at common-law, though the former technical names may have been discarded. Thus, there is uniformly one form of writ issuable against the property, and another against the person. The writ of *elegit* is not in use in this country except in one or two States ; but there are statutory provisions in the several States providing for the levy of execution upon the debtor's real estate, in case of deficiency of personal assets.

¹ See *ante*. page 343, note 9

And, when the restriction of alienation began to wear away, the consequence still continued ; and no creditor could take the possession of lands, but only levy the growing profits : so that if the defendant aliened his lands, the plaintiff was ousted of his remedy. The statute therefore granted this writ (called an *elegit*, because it is in the choice or election of the plaintiff whether he will sue out this writ or one of the former), by which the defendant's goods and chattels are not sold, but only appraised ; and all of them (except oxen and beasts of the plough) are delivered to the plaintiff, at such reasonable appraisement and price, in part of satisfaction of his debt. If the goods are not sufficient, then the moiety or one half of his freehold lands, which he had at the time of the judgment given, whether held in his own name, or by any other in trust for him, are also to be delivered to the plaintiff ; to hold, till out of the rents and profits thereof the debt be levied, or till the defendant's interest be expired ; as till the death of the defendant, if he be tenant for life or in tail. During this period the plaintiff is called tenant by *elegit*, of whom we spoke in a former part of these Commentaries. We there observed that till this statute, by the ancient common law, lands were not liable to be charged with, or seized for, debts ; because by these means the connection between lord and tenant might be destroyed, fraudulent alienations might be made, and the services be transferred to be performed by a stranger ; provided the tenant incurred a large debt, sufficient to cover the land. And therefore, even by this statute, only one half was, and now is, subject to execution ; that out of the remainder sufficient might be left for the lord to distrain upon for his services. And upon the same feudal principle, copyhold lands are at this day not liable to be taken in execution upon a judgment. But, in case of a debt to the king, it appears by *magna charta*, ch. 8, that it was allowed by the common law for him to take possession of the lands till the debt was paid. For he, being the grand superior and ultimate proprietor of all landed estates, might seize the lands into his own hands, if any thing was owing from the vassal ; and could not be said to be defrauded of his services, when the ouster of the vassal proceeded from his own command. This execution, or seizing of lands by *elegit*, is of so high a nature, that after it the body of the defendant cannot be taken : but if execution can only be had of the goods, because there are no lands, and such goods

are not sufficient to pay the debt, a *capias ad satisfaciendum* may then be had after the *elegit*; for such *elegit* is in this case no more in effect than a *feri facias*. So that body and goods may be taken in execution, or land and goods; but not body and land too, upon any judgment between subject and subject in the course of the common law. But—

5. Upon some prosecutions given by statute; as in the case of recognizances or debts acknowledged on statutes-merchant, or statutes-staple (pursuant to the statutes 13 Edw. I. *de mercatoribus*, and 27 Edw. III., ch. 9); upon forfeiture of these, the body, lands, and goods may all be taken at once in execution, to compel the payment of the debt. The process hereon is usually called an *extent*, or *extendi facias*, because the sheriff is to cause the lands, &c., to be appraised to their full extended value, before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be satisfied.

These are the methods which the law of England has pointed out for the execution of judgments: and when the plaintiff's demand is satisfied, either by the voluntary payment of the defendant, or by this compulsory process, or otherwise, satisfaction ought to be entered on the record, that the defendant may not be liable to be hereafter harassed a second time on the same account. But all these writs of execution must be sued out within a year and a day after the judgment is entered; otherwise the court concludes *prima facie* that the judgment is satisfied and extinct: yet however it will grant a writ of *scire facias* in pursuance of statute Westm. 2, 13 Edw. I., ch. 45, for the defendant to show cause why the judgment should not be revived, and execution had against him; to which the defendant may plead such matter as he has to allege, in order to show why process of execution should not be issued: or the plaintiff may still bring an action of debt, founded on this dormant judgment, which was the only method of revival allowed by the common law.

And here this part of our Commentaries, which regularly treats only of redress at the common law, would naturally draw to a conclusion. But, as the proceedings in the courts of equity are very different from those at common law, and as those courts are of a very general and extensive jurisdiction, it is in some measure a branch of the task I have undertaken, to give the student some general idea of the forms of practice adopted by

those courts. These will therefore be the subject of the ensuing chapter.

CHAPTER XXII.

[BL. COMM.—BOOK III. CH. XXVII.]

Of Proceedings in the Courts of Equity.

BEFORE we enter on the proposed subject of the ensuing chapter, *viz.* the nature and method of proceedings in the courts of equity, it will be proper to recollect the observations which were made in the beginning of this book on the principal tribunals of that kind, acknowledged by the constitution of England; and to premise a few remarks upon those particular causes, wherein any of them claims and exercises a sole jurisdiction, distinct from and exclusive of the other.

I have already attempted to trace (though very concisely) the history, rise, and progress, of the extraordinary court, or court of equity, in chancery. The same jurisdiction is exercised, and the same system of redress pursued, in the equity court of the exchequer; with a distinction however, as to some few matters, peculiar to each tribunal, and in which the other cannot interfere.† And, first, of those peculiar to the chancery.

1. Upon the abolition of the court of wards, the care, which the crown was bound to take as guardian of its infant tenants, was totally extinguished in every feudal view; but resulted to the king in his court of chancery, together with the general protection of all other *infants* in the kingdom. When therefore a fatherless child has no other guardian, the court of chancery has a right to appoint one: and from all proceedings relative thereto, an appeal lies to the House of Lords. The court of exchequer can only appoint a guardian *ad litem*, to manage the defence of the infant if a suit be commenced against him; a power which is incident to the jurisdiction of every court of justice: but when the interest of a minor comes before the court judicially, in the progress of a cause, or upon a bill for that purpose filed, either tribunal indiscriminately will take care of the property of the infant.

† See *ante*, p. 638, note 4.

2. As to *idiots* and *lunatics* ; the king himself used formerly to commit the custody of them to proper committees, in every particular case ; but now, to avoid solicitations and the very shadow of undue partiality, a warrant is issued by the king under his royal sign manual, to the chancellor or keeper of his seal, to perform this office for him : and, if he acts improperly in granting such custodies, the complaint must be made to the king himself in council. But the previous proceedings on the commission, to inquire whether or no the party be an idiot or a lunatic, are on the law side of the court of chancery, and can only be redressed (if erroneous) by writ of error in the regular course of law.

3. The king, as *parens patriæ*, has the general superintendence of all *charities* ; which he exercises by the keeper of his conscience, the chancellor. And therefore whenever it is necessary, the attorney-general, at the relation of some informant (who is usually called the *relator*), files *ex officio* an information in the court of chancery to have the charity properly established. By statute also 43 Eliz., ch. 4, authority is given to the lord chancellor or lord keeper, and to the chancellor of the duchy of Lancaster, respectively, to grant commissions under their several seals, to inquire into any abuses of charitable donations, and rectify the same by decree ; which may be reviewed in the respective courts of the several chancellors, upon exceptions taken thereto. But, though this is done in the petty bag office in the court of chancery, because the commission is there returned, it is not a proceeding at common law, but treated as an original cause in the court of equity. The evidence below is not taken down in writing, and the respondent in his answer to the exceptions may allege what new matter he pleases ; upon which they go to proof, and examine witnesses in writing upon all the matters in issue : and the court may decree the respondent to pay all the costs, though no such authority is given by the statute. And as it is thus considered as an original cause throughout, an appeal lies of course from the chancellor's decree to the house of peers, notwithstanding any loose opinions as to the contrary.

4. By the several statutes relating to *bankrupts*, a summary jurisdiction is given to the chancellor, in many matters consequential or previous to the commissions thereby directed to be issued ; from which the statutes give no appeal.

Or. the other hand, the jurisdiction of the court of chancery doth not extend to some causes, wherein relief may be had in the exchequer. No information can be brought in chancery for such mistaken charities, as are given to the king by the statutes for suppressing superstitious uses. Nor can chancery give any relief against the king, or direct any act to be done by him, or make any decree disposing of or affecting his property ; not even in cases where he is a royal trustee. Such causes must be determined in the court of exchequer, as a court of revenue ; which alone has power over the king's treasure, and the officers employed in its management : unless where it properly belongs to the duchy court of Lancaster, which hath also a similar jurisdiction as a court of revenue ; and, like the other, consists of both a court of law and a court of equity.

In all other matters, what is said of the court of equity in chancery will be equally applicable to the other courts of equity. Whatever difference there may be in the forms of practice, it arises from the different constitution of their officers : or, if they differ in any thing more essential, one of them must certainly be wrong ; for truth and justice are always uniform, and ought equally to be adopted by them all.

Let us next take a brief, but comprehensive, view of the general nature of *equity*, as now understood and practised in our several courts of judicature. I have formerly touched upon it, but imperfectly : it deserves a most complete explication. Yet as nothing is hitherto extant, that can give a stranger a tolerable idea of the courts of equity subsisting in England, as distinguished from the courts of law, the compiler of these observations cannot but attempt it with diffidence : those who know them best, are too much employed to find time to write ; and those who have attended but little in those courts, must be often at a loss for materials.

Equity then, in its true and genuine meaning, is the soul and spirit of all law : *positive* law is construed, and *rational* law is made by it. In this, equity is synonymous to justice ; in that, to the true sense and sound interpretation of the rule. But the very terms of a court of *equity*, and a court of *law*, as contrasted to each other, are apt to confound and mislead us : as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illustration to be met with, which

now draws a line between the two jurisdictions, by setting law and equity in opposition to each other, will be found either totally erroneous, or erroneous to a certain degree.

1. Thus in the first place it is said, that it is the business of a court of equity in England to abate the rigor of the common law. But no such power is contended for. Hard was the case of bond-creditors whose debtor devised away his real estate; rigorous and unjust the rule, which put the devisee in a better condition than the heir; yet a court of equity had no power to interpose. Hard is the common law still subsisting, that land devised, or descending to the heir, shall not be liable to simple contract debts of the ancestor or deviser, although the money was laid out in purchasing the very land; and that the father shall never immediately succeed as heir to the real estate of the son¹: but a court of equity can give no relief; though in both these instances the artificial reason of the law, arising from feudal principles has long ago entirely ceased. The like may be observed of the descent of lands to a remote relation of the whole blood, or even their escheat to the lord, in preference to the owner's half brother. In all such cases of positive law, the courts of equity, as well as the courts of law, must say with Ulpian, "*hoc quidem perquam durum est, sed ita lex scripta est.*"

2. It is said, that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound, and equally profess, to interpret statutes according to the true intent of the legislature. In general law all cases cannot be foreseen; or, if foreseen, cannot be expressed: some will arise that will fall within the meaning, though not within the words, of the legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly excepted. These cases, thus out of the letter, are often said to be within the equity, of an act of parliament; and so cases within the letter are frequently out of the equity. Here by *equity* we mean nothing but the sound interpretation of the law; though the words of the law itself may be too general, too special, or otherwise inaccurate or defective. These then are the cases which, as Grotius says, "*lex non exacte definit, sed arbitrio boni viri permittit*:" in order to find out the true sense and meaning

¹ These rules have since been changed.

of the lawgiver, from every other topic of construction. But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in the courts both of law and equity : the construction must in both be the same : or, if they differ, it is only as one court of law may also happen to differ from another. Each endeavors to fix and adopt the true sense of the law in question ; neither can enlarge, diminish, or alter, that sense in a single title.

3. Again, it hath been said, that *fraud*, *accident*, and *trust*, are the proper and peculiar objects of a court of equity. But every kind of *fraud* is equally cognizable, and equally adverted to, in a court of law : and some frauds are cognizable only there : as fraud in obtaining a devise of lands, which is always sent out of the equity courts, to be there determined. Many *accidents* are also supplied in a court of law ; as, loss of deeds, mistakes in receipts or accounts, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies ; and many cannot be relieved even in a court of equity ; as, if by accident a recovery is ill suffered, a devise ill executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement. A technical *trust*, indeed, created by the limitation of a second use, was forced into the courts of equity in the manner formerly mentioned ; and this species of trusts, extended by inference and construction, have ever since remained as a kind of *peculium* in those courts. But there are other trusts, which are cognizable in a court of law ; as deposits, and all manner of bailments : and especially that implied contract, so highly beneficial and useful, of having undertaken to account for money received to another's use, which is the ground of an action on the case almost as universally remedial as a bill in equity.

4. Once more ; it has been said that a court of equity is not bound by rules or precedents, but acts from the opinion of the judge, founded on the circumstances of every particular case. Whereas the system of our courts of equity is a labored connected system, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection. Thus the refusing a wife her dower in a trust-estate, yet allowing the

husband his curtesy ;² the holding the penalty of a bond to be merely a security for the debt and interest, yet considering it sometimes as the debt itself, so that the interest shall not exceed that penalty ; the distinguishing between a mortgage at *five per cent.* with a clause of a reduction to *four*, if the interest be regularly paid, and a mortgage at *four per cent.* with a clause of enlargement to *five*, if the payment of the interest be deferred ; so that the former shall be deemed a conscientious, the latter an unrighteous bargain ; all these, and other cases that might be instanced, are plainly rules of positive law ; supported only by the reverence that is shown, and generally very properly shown to a series of former determinations ; that the rule of property may be uniform and steady. Nay, sometimes a precedent is so strictly followed, that a particular judgment, founded upon special circumstances, gives rise to a general rule.

In short, if a court of equity in England did really act, as many ingenious writers have supposed it (from theory) to do, it would rise above all law, either common or statute, and be a most arbitrary legislator in every particular case. No wonder they are so often mistaken. Grotius, or Puffendorf, or any other of the great masters of jurisprudence, would have been as little able to discover, by their own light, the system of a court of equity in England, as the system of a court of law ; especially, as the notions before mentioned of the character, power, and practice of a court of equity were formerly adopted and propagated (though not with approbation of the thing) by our principal antiquaries and lawyers ; Spelman, Coke, Lambard, and Selden, and even the great Bacon himself. But this was in the infancy of our courts of equity, before their jurisdiction was settled, and when the chancellors themselves, partly from their ignorance of law (being frequently bishops or statesmen), partly from ambition or lust of power (encouraged by the arbitrary principles of the age they lived in), but principally from the narrow and unjust decisions of the courts of law, had arrogated to themselves such unlimited authority, as hath totally been disclaimed by their successors for now above a century past. The decrees of a court of equity were then rather in the nature of awards, formed on the sudden *pro re nata*, with more probity of intention than knowledge of

² Widows are now entitled to dower in equitable estates by English law, and also in this country. (See *ante*, p. 315, note 10.)

the subject, founded on no settled principles, as being never designed, and therefore never used, for precedents. But the systems of jurisprudence, in our courts both of law and equity, are now equally artificial systems, founded on the same principles of justice and positive law ; but varied by different usages in the forms and mode of their proceedings : the one being originally derived (though much reformed and improved) from the feudal customs, as they prevailed in different ages in the Saxon and Norman judicatures ; the other (but with equal improvements) from the imperial and pontifical formularies, introduced by their clerical chancellors.

The suggestion indeed of every bill, to give jurisdiction to the courts of equity (copied from those early times), is that the complainant hath no remedy at the common law. But he who should from thence conclude, that no case is judged of in equity where there might have been relief at law, and at the same time casts his eye on the extent and variety of the cases in our equity reports, must think the law a dead letter indeed. The rules of property, rules of evidence, and rules of interpretation in both courts are, or should be, exactly the same : both ought to adopt the best, or must cease to be courts of justice. Formerly some causes, which now no longer exist, might occasion a different rule to be followed in one court, from what was afterwards adopted in the other, as founded in the nature and reason of the thing : but, the instant those causes ceased, the measure of substantial justice ought to have been the same in both. Thus the penalty of a bond, originally contrived to evade the absurdity of those monkish constitutions which prohibited taking interest for money, was therefore very pardonably considered as the real debt in the courts of law, when the debtor neglected to perform his agreement for the return of the loan with interest ; for the judges could not, as the law then stood, give judgment that the interest should be specifically paid. But when afterwards the taking of interest became legal, as the necessary companion of commerce, nay after the statute of 37 Hen. VIII., ch. 9, had declared the debt or loan itself to be "the just and true intent" for which the obligation was given, their narrow-minded successors still adhered wilfully and technically to the letter of the ancient precedents, and refused to consider the payment of principal, interest, and costs, as a full satisfaction of the bond. At the same time more

liberal men, who sat in the courts of equity, construed the instrument according to its "just and true intent," as merely a security for the loan : in which light it was certainly understood by the parties, at least after these determinations ; and therefore this construction should have been universally received. So in mortgages, being only a landed as the other is a personal security for the money lent, the payment of principal, interest, and costs, ought at any time, before judgment executed, to have saved the forfeiture in a court of law, as well as in a court of equity. And the inconvenience, as well as injustice, of putting different constructions in different courts upon one and the same transaction, obliged the parliament at length to interfere, and to direct by the statutes 4 & 5 Ann., ch. 16, and 7 Geo. II., ch. 20, that, in the cases of bonds and mortgages, what had long been the practice of the courts of equity should also for the future be universally followed in the courts of law wherein it had before these statutes in some degree obtained a footing.

Again ; neither a court of equity nor of law can vary men's wills or agreements, or (in other words) make wills or agreements for them. Both are to understand them truly, and therefore both of them uniformly. One court ought not to extend, nor the other abridge, a lawful provision deliberately settled by the parties, contrary to its just intent. A court of equity, no more than a court of law, can relieve against a penalty in the nature of stated damages ; as a rent of 5*l.* an acre for ploughing up ancient meadow : nor against a lapse of time, where the time is material to the contract ; as in covenants for renewal of leases Both courts will equitably construe, but neither pretends to control or change, a lawful stipulation or engagement.

The rules of decision are in both courts equally apposite to the subjects of which they take cognizance. Where the subject matter is such as requires to be determined *secundum æquum et bonum*, as generally upon actions on the case, the judgments of the courts of law are guided by the most liberal equity. In matters of positive right, both courts must submit to and follow those ancient and invariable maxims "*quæ relictæ sunt et tradita.*" Both follow the law of nations, and collect it from history and the most approved authors of all countries, where the question is the object of that law : as in the case of the privileges of ambassadors, hostages, or ransom-bills. In mercantile transactions, they

follow the marine law, and argue from the usages and authorities received in all maritime countries. Where they exercise a concurrent jurisdiction, they both follow the law of the proper *forum*; in matters originally of ecclesiastical cognizance, they both equally adopt the canon or imperial law, according to the nature of the subject; and, if a question came before either, which was properly the object of a foreign municipal law, they would both receive information what is the rule of the country, and would both decide accordingly.

Such then being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist? It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief. Upon these, and upon two other accidental grounds of jurisdiction, which were formerly driven into those courts by narrow decisions of the courts of law, *viz.* the true construction of securities for money lent, and the form and effect of a trust or second use; upon these main pillars hath been gradually erected that structure of jurisprudence, which prevails in our courts of equity, and is inwardly bottomed upon the same substantial foundations as the legal system which hath hitherto been delineated in these commentaries; however different they may appear in their outward form, from the different taste of their architects.

1. And, first, as to the mode of *proof*. When facts, or their leading circumstances, rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him upon oath with regard to the truth of the transaction: and, that being once discovered, the judgment is the same in equity as it would have been at law. But, for want of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every other court in all matters of account. As incident to accounts, they take a concurrent cognizance of the administration of personal assets, consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. As incident to accounts, they also take the concurrent jurisdiction of tithes, and all questions relating thereto; of all dealings in partnership, and many other mercantile transactions; and so of bailiffs, receivers, factors, and agents. It would be endless to point out all the several avenues in human

affairs, and in this commercial age, which lead to or end in accounts.

From the same fruitful source, the compulsive discovery upon oath, the courts of equity have acquired a jurisdiction over almost all matters of fraud ; all matters in the private knowledge of the party, which, though concealed, are binding in conscience ; and all judgments at law, obtained through such fraud or concealment. And this, not by impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking any advantage of a judgment, obtained by suppressing the truth ; and which, had the same facts appeared on the trial as now are discovered, he would never have attained at all.

2. As to the mode of *trial*. This is by interrogatories administered to the witnesses, upon which their depositions are taken in writing, wherever they happen to reside. If, therefore, the cause arises in a foreign country and the witnesses reside upon the spot : if, in causes arising in England, the witnesses are abroad, or shortly to leave the kingdom ; or if witnesses residing at home are aged or infirm ; any of these cases lays a ground for a court of equity to grant a commission to examine them, and (in consequence) to exercise the same jurisdiction, which might have been exercised at law, if the witnesses could probably attend.

3. With respect to the mode of *relief*. The want of a more specific remedy than can be obtained in the courts of law, gives a concurrent jurisdiction to a court of equity in a great variety of cases. To instance in executory agreements. A court of equity will compel them to be carried into strict execution, unless where it is improper or impossible ; instead of giving damages for their non-performance. And hence a fiction is established, that what ought to be done shall be considered as being actually done, and shall relate back to the time when it ought to have been done originally : and this fiction is so closely pursued through all its consequences, that it necessarily branches out into many rules of jurisprudence, which form a certain regular system. So of waste, and other similar injuries, a court of equity takes a concurrent cognizance, in order to prevent them by injunction. Over questions that may be tried at law, in a great multiplicity of actions, a court of equity assumes a jurisdiction, to prevent the expense and vexation of endless litigations and

suits. In various kinds of frauds it assumes a concurrent jurisdiction, not only for the sake of a discovery, but of a more extensive and specific relief : as by setting aside fraudulent deeds, decreeing reconveyances, or directing an absolute conveyance merely to stand as a security. And thus lastly, for the sake of a more beneficial and complete relief by decreeing a sale of lands a court of equity holds plea of all debts, incumbrances, and charges, that may affect it or issue thereout.

4. The true construction of *securities* for money lent is another fountain of jurisdiction in courts of equity. When they held the penalty of a bond to be the form, and that in substance it was only as a pledge to secure the repayment of the sum *bona fide* advanced, with a proper compensation for the use, they laid the foundation of a regular series of determinations, which have settled the doctrine of personal pledges or securities, and are equally applicable to mortgages of real property. The mortgagor continues owner of the land, the mortgagee of the money lent upon it ; but this ownership is mutually transferred, and the mortgagor is barred from redemption, if, when called upon by the mortgagee, he does not redeem within a time limited by the court ; or he may when out of possession be barred by length of time, by analogy to the statute of limitations.

5. The form of a *trust*, or second use, gives the court of equity an exclusive jurisdiction as to the subject-matter of all settlements and devises in that form, and of all the long terms created in the present complicated mode of conveyancing. This is a very ample source of jurisdiction ; but the trust is governed by nearly the same rules, as would govern the estate in a court of law, if no trustee was interposed ; and by a regular positive system established in the courts of equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of the common-law.

These are the principal (for I omit the minuter) grounds of the jurisdiction at present exercised in our courts of equity : which differ we see, very considerably from the notions entertained by strangers, and even by those courts themselves before they arrived to maturity ; as appears from the principles laid down, and the jealousies entertained of their abuse, by our early juridical writers cited in a former page ; and which have been implicitly received and handed down by subsequent compilers,

without attending to those gradual accessions and derelictions, by which in the course of a century this mighty river hath imperceptibly shifted its channel. Lambard, in particular, in the reign of Queen Elizabeth, lays it down that "equity should not be appealed unto, but only in rare and extraordinary matters; and that a good chancellor will not arrogate authority in every complaint that shall be brought before him upon whatsoever suggestion: and thereby both overthrow the authority of the courts of common-law, and bring upon men such a confusion and uncertainty, as hardly any man should know how or how long to hold his own assured to him." And certainly, if a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case, the inconvenience that would arise from this uncertainty, would be a worse evil than any hardship that could follow from rules too strict and inflexible. Its powers would have become too arbitrary to have been endured in a country like this, which boasts of being governed in all respects by law and not by will. But since the time when Lambard wrote, a set of great and eminent lawyers, who have successively held the great seal, have by degrees erected the system of relief administered by a court of equity into a regular science, which cannot be attained without study and experience, any more than the science of law: but from which, when understood, it may be known what remedy a suitor is entitled to expect, and by what mode of suit, as readily and with as much precision, in a court of equity as in a court of law.

It were much to be wished, for the sake of certainty, peace, and justice, that each court would as far as possible follow the other in the best and most effectual rules for attaining those desirable ends. It is a maxim that equity follows the law; and in former days the law had not scrupled to follow even that equity which was laid down by the clerical chancellors. Every one who is conversant in our ancient books, knows that many valuable improvements in the state of our tenures (especially in leaseholds and copyholds), and the forms of administering justice, have arisen from this single reason, that the same thing was constantly effected by means of a *subpoena* in the chancery. And sure there cannot be a greater solecism, than that in two sovereign independent courts established in the same country,

exercising concurrent jurisdiction, and over the same subject-matter, there should exist in a single instance two different rules of property, clashing with or contradicting each other.

It would carry me beyond the bounds of my present purpose to go further into this matter. I have been tempted to go so far, because strangers are apt to be confounded by nominal distinctions, and the loose unguarded expressions to be met with in the best of our writers; and thence to form erroneous ideas of the separate jurisdictions now existing in England, but which never were separated in any other country in the universe. It hath also afforded me an opportunity to vindicate, on the one hand, the justice of our courts of law from being that harsh and illiberal rule, which many are too ready to suppose it, and on the other, the justice of our courts of equity from being the result of mere arbitrary opinion, or an exercise of dictatorial power, which rides over the law of the land, and corrects, amends, and controls it by the loose and fluctuating dictates of the conscience of a single judge. It is now high time to proceed to the practice of our courts of equity, thus explained, and thus understood.

The first commencement of a suit in chancery is by preferring a bill to the lord chancellor, in the style of a petition; "humbly complaining, sheweth to your lordship your orator A. B. that, &c." This is in the nature of a declaration at common law, or a libel and allegation in the spiritual courts: setting forth the circumstances of the case at length, as, some fraud, trust, or hardship; "in tender consideration whereof" (which is the usual language of the bill,) "and for that your orator is wholly without remedy at the common law," relief is therefore prayed at the chancellor's hands, and also process of *subpœna* against the defendant, to compel him to answer upon oath to all the matter charged in the bill. And, if it be to quiet the possession of lands, to stay waste, or to stop proceedings at law, an injunction is also prayed, in the nature of an *interdictum* by the civil law, commanding the defendant to cease.

This bill must call all necessary parties, however remotely concerned in interest, before the court, otherwise no decree can be made to bind them; and must be signed by counsel, as a certificate of its decency and propriety. For it must not contain matter either scandalous or impertinent: if it does, the defendant may refuse to answer it, till such scandal or impertinence is ex-

punged, which is done upon an order to refer it to one of the officers of the court, called a master in chancery ; of whom there are in number twelve, including the master of the rolls, all of whom, so late as the reign of Queen Elizabeth, were commonly doctors of the civil law. The master is to examine the propriety of the bill : and if he reports it scandalous or impertinent, such matter must be struck out, and the defendant shall have his costs ; which ought of right to be paid by the counsel who signed the bill.

When the bill is filed in the office of the six clerks (who originally were all in orders ; and therefore, when the constitution of the court began to alter, a law was made to permit them to marry), when, I say, the bill is thus filed, if an injunction be prayed therein, it may be had at various stages of the cause, according to the circumstances of the case. If the bill be to stay execution upon an oppressive judgment, and the defendant does not put in his answer within the stated time allowed by the rules of the court, an injunction will issue of course : and, when the answer comes in, the injunction can only be continued upon a sufficient ground appearing from the answer itself. But if an injunction be wanted to stay waste, or other injuries of an equally urgent nature, then upon the filing of the bill, and a proper case supported by *affidavits*, the court will grant an injunction immediately to continue till the defendant has put in his answer, and till the court shall make some farther order concerning it : and when the answer comes in, whether it shall then be dissolved or continued till the hearing of the cause, is determined by the court upon argument, drawn from considering the answer and affidavit together.

But, upon common bills, as soon as they are filed, process of *subpœna* is taken out : which is a writ commanding the defendant to appear and answer to the bill, on pain of 100*l*. But this is not all ; for if the defendant, on service of the *subpœna*, does not appear within the time limited by the rules of the court, and plead, demur, or answer to the bill, he is then said to be in *contempt* ; and the respective processes of contempt are in successive order awarded against him. The first of which is an *attachment*, which is a writ in the nature of a *capias*, directed to the sheriff, and commanding him to attach, or take up, the defendant, and bring him into court. If the sheriff returns that the defendant

is *non est inventus*, then an *attachment with proclamations* issues ; which, besides the ordinary form of attachment, directs the sheriff, that he cause public proclamations to be made, throughout the county, to summon the defendant, upon his allegiance, personally to appear and answer. If this be also returned with a *non est inventus*, and he still stands out in contempt, a *commission of rebellion* is awarded against him, for not obeying the king's proclamations according to his allegiance ; and four commissioners therein named, or any of them, are ordered to attach him where-soever he may be found in Great Britain, as a rebel and contemnêr of the king's laws and government, by refusing to attend his sovereign when thereunto required : since, as was before observed, matters of equity were originally determined by the king in person, assisted by his council ; though that business is now devolved upon his chancellor. If upon this commission of rebellion a *non est inventus* is returned, the court then sends a *serjeant at arms* in quest of him ; and if he eludes the search of the serjeant also, then a *sequestration* issues to seize all his personal estate, and the profits of his real, and to detain them, subject to the order of the court. Sequestrations were first introduced by Sir Nicholas Bacon, lord keeper in the reign of Queen Elizabeth ; before which the court found some difficulty in enforcing its process, and decrees. After an order for a sequestration issued, the plaintiff's bill is to be taken *pro confesso*, and a decree to be made accordingly. So that the sequestration does not seem to be in the nature of process to bring in the defendant, but only intended to enforce the performance of the decree. Thus much if the defendant absconds.

If the defendant is taken upon any of this process, he is to be committed to the fleet, or other prison, till he puts in his appearance, or answer, or performs whatever else this process is issued to enforce, and also clears his contempts by paying the costs which the plaintiff has incurred thereby. For the same kind of process (which was also the process of the court of Star Chamber till its dissolution) is issued out in all sorts of contempts during the progress of the cause, if the parties in any point refuse or neglect to obey the order of the court.

The process against a body corporate is by *distringas*, to distrain them by their goods and chattels, rents and profits, till they shall obey the summons or directions of the court. And, if

a peer is a defendant, the lord chancellor sends a *letter missive* to him to request his appearance, together with a copy of the bill ; and, if he neglects to appear, then he may be served with a *subpœna* ; and, if he continues still in contempt, a sequestration issues out immediately against his lands and goods, without any of the mesne process of attachments, &c., which are directed only against the person, and therefore cannot affect a lord of parliament. The same process issues against a member of the House of Commons, except only that the lord chancellor sends him no letter missive.

The ordinary process before mentioned cannot be sued out till after the service of the *subpœna*, for then the contempt begins ; otherwise he is not presumed to have notice of the bill : and therefore by absconding to avoid the *subpœna* a defendant might have eluded justice, till the statute 5 Geo. II., ch. 25, which enacts that, where the defendant cannot be found to be served with process of *subpœna*, and absconds (as is believed) to avoid being served therewith, a day shall be appointed him to appear to the bill of the plaintiff ; which is to be inserted in the London Gazette, read in the parish church where the defendant last lived, and fixed up at the royal exchange ; and, if the defendant doth not appear upon that day, the bill shall be taken *pro confesso*.

But if the defendant appears regularly, and takes a copy of the bill, he is next to *demur*, *plead*, or *answer*.

A demurrer in equity is nearly of the same nature as a demurrer in law ; being an appeal to the judgment of the court, whether the defendant shall be bound to answer the plaintiff's bill ; as, for want of sufficient matter of equity therein contained ; or where the plaintiff, upon his own showing, appears to have no right ; or where the bill seeks a discovery of a thing which may cause a forfeiture of any kind, or may convict a man of any criminal misbehavior. For any of these causes a defendant may demur to the bill. And if, on demurrer, the defendant prevails, the plaintiff's bill shall be dismissed : if the demurrer be overruled, the defendant is ordered to answer.

A plea may be either to the *jurisdiction* ; showing that the court has no cognizance of the cause : or to the *person* ; showing some disability in the plaintiff, as by outlawry, excommunication, and the like : or it is in *bar* ; showing some matter wherefore the plaintiff can demand no relief, as an act of parliament, a fine,

a release, or a former *decrêe*. And the truth of this plea the defendant is bound to prove, if put upon it by the plaintiff. But as bills are often of a complicated nature, and contain various matter, a man may plead as to part, demur as to part, and answer to the residue. But no exceptions to formal *minutiæ* in the pleadings will be here allowed ; for the parties are at liberty, on the discovery of any errors in form, to amend them.

An *answer* is the most usual defence that is made to a plaintiff's bill. It is given in upon oath, or the honor of a peer or peeress ; but where there are amicable defendants, their answer is usually taken without oath by consent of the plaintiff. This method of proceeding is taken from the ecclesiastical courts, like the rest of the practice in chancery : for there, in almost every case, the plaintiff may demand the oath of his adversary in supply of proof. Formerly this was done in those courts with compurgators, in the manner of our waging of law ; but this has been long disused ; and instead of it the present kind of purgation, by the single oath of the party himself, was introduced. This oath was made use of in the spiritual courts, as well in criminal cases of ecclesiastical cognizance, as in matters of civil right ; and it was then usually denominated the oath *ex officio* : whereof the high commission court, in particular, made a most extravagant and illegal use ; forming a court of inquisition, in which all persons were obliged to answer in cases of bare suspicion, if the commissioners thought proper to proceed against them *ex officio* for any supposed ecclesiastical enormities. But when the high commission court was abolished by statute 16 Car. I., ch. 11, this oath *ex officio* was abolished with it ; and it is also enacted by statute 13 Car. II., st. 1, ch. 12, "that it shall not be lawful for any bishop or ecclesiastical judge to tender to any person the oath *ex officio*, or any other oath whereby the party may be charged or compelled to confess, accuse, or purge himself, of any criminal matter." But this does not extend to oaths in a civil suit, and therefore it is still the practice, both in the spiritual courts and in equity, to demand the personal answer of the party himself upon oath. Yet if in the bill any question be put, that tends to the discovery of any crime, the defendant may thereupon demur, as was before observed, and may refuse to answer.

If the defendant lives within twenty miles of London, he must be sworn before one of the masters of the court : if farther off,

there may be a *dedimus potestatem*, or commission to take his answer in the country, where the commissioners administer him the usual oath ; and then, the answer being sealed up, either one of the commissioners carries it up to the court ; or it is sent by a messenger, who swears he received it from one of the commissioners, and that the same has not been opened or altered since he received it. An answer must be signed by counsel, and must either deny or confess all the material parts of the bill ; or it may confess and avoid, that is, justify or palliate the facts. If one of these is not done, the answer may be excepted to for insufficiency, and the defendant be compelled to put in a more sufficient answer. A defendant cannot pray any thing in this his answer, but to be dismissed the court ; if he has any relief to pray against the plaintiff, he must do it by an original bill of his own, which is called a *cross-bill*.

After answer put in, the plaintiff upon payment of costs may amend his bill, either by adding new parties, or new matter, or both, upon the new lights given him by the defendant ; and the defendant is obliged to answer afresh to such amended bill. But this must be before the plaintiff has replied to the defendant's answer, whereby the cause is at issue ; for afterwards, if new matter arises, which did not exist before, he must set it forth by a *supplemental-bill*. There may be also a bill of *revivor* when the suit is abated by the death of any of the parties ; in order to set the proceedings again in motion, without which they remain at a stand. And there is likewise a bill of *interpleader* ; where a person who owes a debt or rent to one of the parties in suit, but, till the determination of it, he knows not to which, desires that they may interplead, that he may be safe in the payment. In this last case it is usual to order the money to be paid into court for the benefit of such of the parties, to whom upon hearing the court shall decree it to be due. But this depends upon circumstances ; and the plaintiff must also annex an *affidavit* to his bill, swearing that he does not collude with either of the parties.

If the plaintiff finds sufficient matter confessed in the defendant's answer to ground a decree upon, he may proceed to the hearing of the cause upon bill and answer only. But in that case he must take the defendant's answer to be true, in every point. Otherwise the course is for the plaintiff to reply generally to the answer, averring his bill to be true, certain, and sufficient, and

the defendant's answer to be directly the reverse ; which he is ready to prove as the court shall award ; upon which the defendant rejoins, averring the like on his side ; which is joining issue upon the facts in dispute. To prove which facts is the next concern.

This is done by examination of witnesses, and taking their *depositions* in writing, according to the manner of the civil law. And for that purpose *interrogatories* are framed, or questions in writing ; which, and which only, are to be proposed to, and asked of, the witnesses in the cause. These interrogatories must be short and pertinent : not leading ones ; (as, " Did not you see this, or, did not you hear that ; ") for if they be such, the depositions taken thereon will be suppressed and not suffered to be read. For the purpose of examining witnesses in or near London, there is an examiner's office appointed ; but for such as live in the country, a commission to examine witnesses is usually granted to four commissioners, two named of each side, or any three or two of them, to take the depositions there. And if the witnesses reside beyond sea, a commission may be had to examine them there upon their own oaths, and (if foreigners) upon the oaths of skilful interpreters. And it hath been established that the deposition of a heathen who believes in the Supreme Being, taken by commission in the most solemn manner according to the custom of his own country, may be read in evidence.

The commissioners are sworn to take the examinations truly and without partiality, and not to divulge them till published in the court of chancery ; and their clerks are also sworn to secrecy. The witnesses are compellable by process of *subpœna*, as in the courts of common law, to appear and submit to examination. And when their depositions are taken, they are transmitted to the court with the same care that the answer of a defendant is sent.

If witnesses to a disputable fact are old and infirm, it is very usual to file a bill to perpetuate the testimony of those witnesses ; although no suit is depending ; for, it may be, a man's antagonist only waits for the death of some of them to begin his suit. This is most frequent when lands are devised by will away from the heir at law ; and the devisee, in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in chancery against the heir, and sets forth the will *verbatim* therein, suggesting that

the heir is inclined to dispute its validity : and then, the defendant having answered, they proceed to issue as in other cases, and examine the witnesses to the will ; after which the cause is at an end, without proceeding to any decree, no relief being prayed by the bill : but the heir is entitled to his costs, even though he contests the will. This is what is usually meant by proving a will in chancery.

When all the witnesses are examined, then, and not before, the deposition may be published, by a rule to pass publication ; after which they are open for the inspection of all the parties, and copies may be taken of them. The cause is then ripe to be set down for hearing, which may be done at the procurement of the plaintiff, or defendant, before either the lord chancellor or the master of the rolls, according to the discretion of the clerk in court, regulated by the nature and importance of the suit, and the arrear of causes depending before each of them respectively. Concerning the authority of the master of the rolls, to hear and determine causes, and his general power in the court of chancery, there were (not many years since) divers questions, and disputes very warmly agitated ; to quiet which it was declared by statute 3 Geo. II., ch. 30, that all orders and decrees by him made, except such as by the course of the court were appropriated to the great seal alone, should be deemed to be valid ; subject nevertheless to be discharged or altered by the lord chancellor and so as they shall not be enrolled, till the same are signed by his lordship. Either party may be *subpœnæd* to hear judgment on the day so fixed for the hearing : and then, if the plaintiff does not attend, his bill is dismissed with costs ; or, if the defendant makes default, a decree will be made against him, which will be final, unless he pays the plaintiff's cost of attendance, and shows good cause to the contrary on a day appointed by the court. A plaintiff's bill may also at any time be dismissed for want of prosecution, which is in the nature of a non-suit at law, if he suffers three terms to elapse without moving forward in the cause.

When there are cross causes, on a cross-bill filed by the defendant against the plaintiff in the original cause, they are generally contrived to be brought on together, that the same hearing and the same decree may serve for both of them. The method of hearing causes in court is usually this. The parties on both sides appearing by their counsel, the plain-

tiff's bill is first opened or briefly abridged, and the defendant's answer also, by the junior counsel on each side : after which the plaintiff's leading counsel states the case and the matters in issue, and the points of equity arising therefrom : and then such depositions as are called for by the plaintiff are read by one of the six clerks, and the plaintiff may also read such part of the defendant's answer as he thinks material or convenient : and after this the rest of the counsel for the plaintiff make their observations and arguments. Then the defendant's counsel go through the same process for him, except that they may not read any part of his answer ; and the counsel for the plaintiff are heard in reply. When all are heard, the court pronounces the *decree*, adjusting every point in debate according to equity and good conscience ; which decree being usually very long, the minutes of it are taken down, and read openly in court by the registrar. The matter of costs to be given to either party, is not here held to be a point of right, but merely discretionary (by the statute 17 Ric. II., ch. 6), according to the circumstances of the case, as they appear more or less favorable to the party vanquished. And yet the statute 15 Hen. VI., ch. 4, seems expressly to direct, that as well damages as costs shall be given to the defendant, if wrongfully vexed in this court.

The chancellor's decree is either *interlocutory* or *final*. It very seldom happens that the first decree can be final, or conclude the cause ; for, if any matter of fact is strongly controverted, this court is so sensible of the deficiency of trial by written depositions, that it will not bind the parties thereby, but usually directs the matter to be tried by jury ; especially such important facts as the validity of a will, or whether A. is the heir at law to B., or the existence of a *modus decimandi*, or real and immemorial composition for tithes. But, as no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the court of king's bench or at the assizes, upon a *feigned issue*. For (in order to bring it there, and have the point in dispute, and that only, put in issue), an action is brought, wherein the plaintiff by a fiction declares that he laid a wager of 5*l.* with the defendant, that A. was heir at law to B. ; and then avers that he is so : and therefore demands 5*l.* The defendant admits the feigned wager, but avers that A. is not the heir to B. ; and thereupon that issue is joined, which is directed out of chancery to

be tried ; and thus the verdict of the jurors at law determines the fact in the court of equity. These feigned issues seem borrowed from the *sponsio judicialis* of the Romans : and are also frequently used in the courts of law, by consent of the parties, to determine some disputed right without the formality of pleading, and thereby to save much time and expense in the decision of a cause.

So likewise, if a question of mere law arises in the course of a cause, as whether by the words of a will an estate for life or in tail is created, or whether a future interest devised by a testator shall operate as a remainder or an executory devise, it is the practice of this court to refer it to the opinion of the judges of the court of king's bench or common pleas, upon a case stated for that purpose ; wherein all the material facts are admitted and the point of law is submitted to their decision : who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the chancellor. And upon such certificate the decree is usually founded.

Another thing also retards the completion of decrees. Frequently long accounts are to be settled, incumbrances and debts to be inquired into, and a hundred little facts to be cleared up, before a decree can do full and sufficient justice. These matters are always by the decree on the first hearing referred to a master in chancery to examine ; which examinations frequently last for years ; and then he is to report the fact, as it appears to him, to the court. This report may be excepted to, disproved, and overruled ; or otherwise is confirmed, and made absolute, by order of the court.

When all issues are tried and settled, and all references to the master ended, the cause is again brought to hearing upon the matters of equity reserved ; and a final decree is made : the performance of which is enforced (if necessary) by commitment of the person, or sequestration of the party's estate. And if by this decree either party thinks himself aggrieved, he may petition the chancellor for a *rehearing* ; whether it was heard before his lordship, or any of the judges, sitting for him, or before the master of the rolls. For whoever may have heard the cause, it is the chancellor's decree, and must be signed by him before it is enrolled ; which is done of course unless a rehearing be desired. Every petition for a rehearing must be signed by two counsel of

character, usually such as have been concerned in the cause, certifying that they apprehend the cause is proper to be reheard. And upon the rehearing, all the evidence taken in the cause whether read before or not, is now admitted to be read ; because it is the decree of the chancellor himself, who only now sits to hear reasons why it should not be enrolled and perfected ; at which time all omissions of either evidence or argument may be supplied. But after the decree is once signed and enrolled, it cannot be reheard or rectified, but by bill of review, or by appeal to the House of Lords.

A bill of *review* may be had upon apparent error in judgment, appearing on the face of the decree ; or, by special leave of the court, upon oath made of the discovery of new matter or evidence, which could not possibly be had or used at the time when the decree passed. But no new evidence or matter then in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a bill of review.

An *appeal* to parliament, that is, to the House of Lords, is the dernier resort of the subject who thinks himself aggrieved by an interlocutory order or final determination in this court : and it is effected by *petition* to the House of Peers, and not by *writ of error*, as upon judgments at common law. This jurisdiction is said to have begun in 18 Jac. I., and it is certain, that the first petition, which appears in the records of parliament, was preferred in that year ; and that the first which was heard and determined (though the name of appeal was then a novelty) was presented in a few months after ; both levelled against the Lord Chancellor Bacon for corruption and other misbehavior. It was afterwards warmly controverted by the House of Commons in the reign of Charles the Second. But this dispute is now at rest : it being obvious to the reason of all mankind, that when the courts of equity became principal tribunals for deciding causes of property, a revision of their decrees (by way of appeal) became equally necessary, as a writ of error from the judgment of a court of law. And, upon the same principle, from decrees of the chancellor relating to the commissioners for the dissolution of chauntries, &c., under the statute of 37 Hen. VIII., ch. 4 (as well as for charitable uses under the statute 43 Eliz., ch. 4), an appeal to the king in parliament was always unquestionably allowed. But no new evidence is admitted in the House of

Lords upon any account ; this being a distinct jurisdiction : which differs it very considerably from those instances, wherein the same jurisdiction revises and corrects its own acts, as in rehearings and bills of review. For it is a practice unknown to our law (though constantly followed in the spiritual courts), when a superior court is reviewing the sentence of an inferior, to examine the justice of the former decree by evidence that was never produced below. And thus much for the general method of proceeding in the courts of equity.³

³ The procedure in courts of equity has been, to a considerable extent, changed by recent English legislation ; and in several of the States of this country, also, the practice, which was formerly quite similar to that stated in the text, has been altered in important respects. Thus in New York and other States which have adopted codes of civil procedure, the same rules of pleading are established for equity suits as for common-law actions, and instead of the elaborate "bill" of strict equity practice, the first pleading is a complaint or petition, which is simply required to "state the facts constituting the cause of action," with a demand of the appropriate judgment. This may be followed by demurrer, answer, and reply, as in common-law cases. (See *ante*, p. 781, note 4.) So the first process in these States is not a *subpœna*, following the plaintiff's first pleading, but a summons preceding or accompanying his complaint. But the modes of relief and of enforcing equitable judgments or decrees have not been essentially changed, even in these States, and the regular mode of trial is still before a judge sitting without a jury. In States not having codes of procedure, the regular equity practice and system of pleading, as outlined by Blackstone, are still, in general, retained, though often with statutory modifications.

By modern statutes in various States, the equitable remedy of discovery has been supplanted by statutory methods accomplishing the same end, and witnesses also are allowed to testify in equity cases *viva voce* in court, instead of by deposition.

The practice in equity of the United States Circuit and District Courts is governed by an extensive body of rules prescribed by the United States Supreme Court. These are in general conformity with the regular methods of equity practice, as derived from England, and are supplemented by its rules and principles, whenever found necessary. (U. S. Rev. St. §§ 913, 917.)

BOOK THE FOURTH.

OF PUBLIC WRONGS.

CHAPTER I.

[BL. COMM.—BOOK IV., CH. I.]

Of the Nature of Crimes, and their Punishment

WE are now arrived at the fourth and last branch of these Commentaries ; which treats of *public wrongs*, or *crimes* and *misdemeanors*. For we may remember that, in the beginning of the preceding book, wrongs were divided into two species : the one *private* and the other *public*. Private wrongs, which are frequently termed civil injuries, were the subject of that entire book : we are now therefore, lastly, to proceed to the consideration of public wrongs, or crimes and misdemeanors ; with the means of their prevention and punishment. In the pursuit of which subject I shall consider, in the *first* place, the general nature of crimes and punishments ; *secondly*, the persons capable of committing crimes ; *thirdly*, their several degrees of guilt, as principals, or accessories ; *fourthly*, the several species of crimes, with the punishment annexed to each by the laws of England ; *fifthly*, the means of preventing their perpetration ; and, *sixthly*, the method of inflicting those punishments, which the law has annexed to each several crime and misdemeanor.

First, as to the general nature of crimes and their punishment: the discussion and admeasurement of which forms in every country the code of criminal law; or, as it is more usually denominated with us in England, the doctrine of the *pleas of the crown*; so called, because the king, in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights, belonging to that community, and is therefore in all cases the proper prosecutor for every public offence.

The knowledge of this branch of jurisprudence, which teaches the nature, extent, and degrees of every crime, and adjusts to it its adequate and necessary penalty, is of the utmost importance to every individual in the state. For (as a very great master of the crown law^(a) has observed upon a similar occasion) no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude, that he may not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vices, and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us (upon a moment's reflection) that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern.

In proportion to the importance of the criminal law ought also to be the care and attention of the legislature in properly forming and enforcing it. It should be founded upon principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind: though it sometimes (provided there be no transgression of these external boundaries) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the state which it is meant to govern. And yet, either from a want of attention to these principles in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition, and revenge: from retaining the discordant political regulations, which successive conquerors or factions have established, in the various revolutions of government; from giving a lasting efficacy

(a) Sir Michael Foster.

to sanctions that were intended to be temporary, and made (as Lord Bacon expresses it) merely upon the spur of the occasion ; or from, lastly, too hastily employing such means as are greatly disproportionate to their end, in order to check the progress of some very prevalent offence : from some, or from all of these causes, it hath happened, that the criminal law is in every country of Europe more rude and imperfect than the civil. I shall not here enter into any minute inquiries concerning the local constitutions of other nations : the inhumanity and mistaken policy of which have been sufficiently pointed out by ingenious writers of their own.. But even with us in England, where our crown law is with justice supposed to be more nearly advanced to perfection ; where crimes are more accurately defined, and penalties less uncertain and arbitrary ; where all our accusations are public, and our trials in the face of the world ; where torture is unknown, and every delinquent is judged by such of his equals, against whom he can form no exception nor even a personal dislike ;—even here we shall occasionally find room to remark some particulars that seem to want revision and amendment. These have chiefly arisen from too scrupulous an adherence to some rules of the ancient common law, where the reasons have ceased upon which those rules were founded ; from not repealing such of the old penal laws as are either obsolete or absurd ; and from too little care and attention in framing and passing new ones. The enacting of penalties to which a whole nation should be subject, ought not to be left as a matter of indifference to the passions or interests of a few, who upon temporary motives may prefer or support such a bill ; but be calmly and maturely considered by persons who know what provisions the laws have already made to remedy the mischief complained of, who can from experience foresee the probable consequences of those which are now proposed, and who will judge without passion or prejudice how adequate they are to the evil. It is never usual in the House of Peers even to read a private bill, which may affect the property of an individual, without first referring it to some of the learned judges, and hearing their report thereon. And surely equal precaution is necessary, when laws are to be established, which may affect the property, the liberty, and perhaps even the lives of thousands. Had such a reference taken place, it is im

possible that in the eighteenth century it could ever have been made a capital crime, to break down (however maliciously) the mound of a fishpond, whereby any fish shall escape ; or to cut down a cherry-tree in an orchard. Were even a committee appointed but once in a hundred years to revise the criminal law it could not have continued to this hour a felony, without benefit of clergy, to be seen for one month in the company of persons who call themselves, or are called, Egyptians.

It is true, that these outrageous penalties, being seldom or never inflicted, are hardly known to be law by the public :¹ but that rather aggravates the mischief, by laying a snare for the unwary. Yet they cannot but occur to the observation of any one, who hath undertaken the task of examining the great outlines of the English law, and tracing them up to their principles : and it is the duty of such a one to hint them with decency to those, whose abilities and stations enable them to apply the remedy. Having therefore premised this apology for some of the ensuing remarks, which might otherwise seem to savor of arrogance, I proceed now to consider (in the first place) the general nature of *crimes*.

I. A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors ; which, properly speaking, are mere synonymous terms ; though, in common usage, the word " crimes " is made to denote such offences as are of a deeper and more atrocious dye ; while smaller faults, and omissions of less consequence, are comprised under the gentler name of " misdemeanors " only.²

The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this : that private wrongs, or civil injuries, are an infringe-

¹ A great amelioration of the criminal law of England has been effected in recent times ; and many comparatively trivial offenses, of which Blackstone speaks as constituting felonies, have since been reduced to misdemeanors, and are visited with much slighter punishments. There has been a more adequate recognition of the principle that the severity of the penalty should be proportionate, as far as practicable, to the heinousness of the offense, in order to secure certainty of punishment, and thereby ensure the adequate, proper enforcement of the law.

² The word " crime " is generally employed in law as a generic designa-

ment or privation of the civil rights which belong to individuals considered merely as individuals: public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity. As if I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime: for here only the right of an individual is concerned, and it is immaterial to the public, which of us is in possession of the land; but, treason, murder, and robbery are properly ranked among crimes; since, besides the injury done to individuals, they strike at the very being of society, which cannot possibly subsist where actions of this sort are suffered to escape with impunity.

In all cases the crime includes an injury; every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community. Thus treason in imagining the king's death involves in it conspiracy against an individual, which is also a civil injury; but, as this species of treason in its consequences principally tends to the dissolution of government, and the destruction thereby of the order and peace of society, this denominates it a crime of the highest magnitude. Murder is an injury to the life of an individual; but the law of society considers principally the loss which the state sustains by being deprived of a member, and the pernicious example thereby set for others to do the like. Robbery may be considered in the same view: it is an injury to *private* property; but were that all, a civil satisfaction in damages might atone for it: the *public* mischief is the thing, for the prevention of which our laws have made it a capital offence. In these gross and atrocious injuries the private wrong is swallowed up in the public: we seldom hear of, applying to all offenses of a public nature, for which an indictment or public prosecution may be instituted. Crimes are then classified as "felonies" and "misdemeanors"; the former term denoting those which are the more heinous; while the latter applies to those which are of an inferior or more trivial grade. In English law, a felony is any crime which, at common-law, was attended with a forfeiture of lands, or goods, or both; all other criminal offenses are misdemeanors. But, in this country, a different distinction is generally drawn. Thus, in many States, a felony is any crime punishable with death, or with imprisonment in a State prison; while all other crimes are misdemeanors. But, in some States, there is said to be no precise discrimination between the meaning and application of these terms. (See 117 U. S. 348; 99 N. Y. 210.)

any mention made of satisfaction to the individual ; the satisfaction to the community being so very great. And indeed, as the public crime is not otherwise avenged than by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrong : which can only be had from the body or goods of the aggressor. But there are crimes of an inferior nature, in which the public punishment is not so severe, but it affords room for a private compensation also ; and herein the distinction of crimes from civil injuries is very apparent. For instance ; in the case of battery, or beating another, the aggressor may be indicted for this at the suit of the king, for disturbing the public peace, and be punished criminally by fine and imprisonment ; and the party beaten may also have his private remedy by action of trespass for the injury which he in particular sustains, and recover a civil satisfaction in damages. So also, in case of a public nuisance, as digging a ditch across a highway, this is punishable by indictment, as a common offence to the whole kingdom and all His Majesty's subjects ; but if any individual sustains any special damage thereby, as laming his horse, breaking his carriage, or the like, the offender may be compelled to make ample satisfaction, as well for the private injury as for the public wrong.

Upon the whole we may observe, that in taking cognizance of all wrongs, or unlawful acts, the law has a double view : *viz.*, not only to redress the party injured, by either restoring to him his right, if possible, or by giving him an equivalent ; the manner of doing which was the object of our inquiries in the preceding book of these Commentaries ; but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish for the government and tranquillity of the whole. What those breaches are, and how prevented or punished, are to be considered in the present book.

II. The nature of *crimes and misdemeanors* in general being thus ascertained and distinguished, I proceed, in the next place, to consider the general nature of *punishments* : which are evils or inconveniences consequent upon crimes and misdemeanors ; being devised, denounced, and inflicted by human laws, in consequence of disobedience or misbehavior in those, to regulate

whose conduct such laws were respectively made. And herein we will briefly consider the *power*, the *end*, and the *measure* of human punishment.

1. As to the *power* of human punishment, or the right of the temporal legislator to inflict discretionary penalties for crimes and misdemeanors. It is clear, that the right of punishing crimes against the law of nature, as murder and the like, is in a state of mere nature vested in every individual. For it must be vested in somebody; otherwise the laws of nature would be vain and fruitless, if none were empowered to put them in execution: and if that power is vested in any *one*, it must also be vested in *all* mankind; since all are by nature equal. Whereof the first murderer Cain was so sensible, that we find him expressing his apprehensions, that *whoever* should find him would slay him. In a state of society this right is transferred from individuals to the sovereign power; whereby men are prevented from being judges in their own causes, which is one of the evils that civil government was intended to remedy. Whatever power therefore individuals had of punishing offences against the law of nature, that is now vested in the magistrate alone; who bears the sword of justice by the consent of the whole community. And to this precedent natural power of individuals must be referred that right, which some have argued to belong to every state (though, in fact, never exercised by any), of punishing not only their own subjects, but also foreign ambassadors, even with death itself; in case they have offended, not indeed against the municipal laws of the country, but against the divine laws of nature, and become liable thereby to forfeit their lives for their guilt.

As to offences merely against the laws of society, which are only *mala prohibita*, and not *mala in se*; the temporal magistrate is also empowered to inflict coercive penalties for such transgressions; and this by the consent of individuals; who, in forming societies, did either tacitly or expressly invest the sovereign power with the right of making laws, and of enforcing obedience to them when made, by exercising, upon their non-observance, severities adequate to the evil. The lawfulness therefore of punishing such criminals is founded upon this principle, that the law by which they suffer was made by their own consent; it is a part of the original contract into which they entered, when first

they engaged in society ; it was calculated for, and has long contributed to, their own security.

This right therefore, being thus conferred by universal consent, gives to the state exactly the same power, and no more, over all its members, as each individual member had naturally over himself or others. Which has occasioned some to doubt, how far a human legislature ought to inflict capital punishments for *positive* offences ; offences against the municipal law only, and not against the law of nature : since no individual has, naturally, a power of inflicting death upon himself or others for actions in themselves indifferent. With regard to offences *mala in se*, capital punishments are in some instances inflicted by the immediate *command* of God himself to all mankind ; as in the case of murder, by the precept delivered to Noah, their common ancestor and representative, “whoso sheddeth man’s blood, by man shall his blood be shed.” In other instances they are inflicted after the *example* of the Creator, in his positive code of laws for the regulation of the Jewish republic : as in the case of the crime against nature. But they are sometimes inflicted without such express warrant or example, at the will and discretion of the human legislature ; as for forgery, for theft, and sometimes for offences of a lighter kind. Of these we are principally to speak ; as these crimes are, none of them, offences against natural, but only against social rights ; not even theft itself, unless it be accompanied with violence to one’s house or person : all others being an infringement of that right of property, which, as we have formerly seen, owes its origin not to the law of nature, but merely to civil society.

The practice of inflicting capital punishments, for offences of human institution, is thus justified by that great and good man, Sir Matthew Hale : “When offences grow enormous, frequent, and dangerous to a kingdom or state, destructive or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom or its inhabitants, severe punishment and even death itself is necessary to be annexed to laws in many cases by the prudence of lawgivers.” It is therefore the enormity or dangerous tendency of the crime that alone can warrant any earthly legislature in putting him to death that commits it. It is not its frequency only, or the difficulty of otherwise preventing it, that will excuse our attempting to prevent it by a wanton

effusion of human blood. For, though the end of punishment is to deter men from offending, it never can follow from thence, that it is lawful to deter them at any rate and by any means ; since there may be unlawful methods of enforcing obedience even to the justest laws. Every humane legislator will be therefore extremely cautious of establishing laws that inflict the penalty of death, especially for slight offences, or such as are merely positive. He will expect a better reason for his so doing, than that loose one which generally is given ; that it is found by former experience that no lighter penalty will be effectual. For is it found upon further experience, that capital punishments are more effectual? Was the vast territory of all the Russias worse regulated under the late Empress Elizabeth, than under her more sanguinary predecessors ? Is it now, under Catherine II., less civilized, less social, less secure ? And yet we are assured, that neither of these illustrious princesses have, throughout their whole administration, inflicted the penalty of death : and the latter has, upon full persuasion of its being useless, nay, even pernicious, given orders for abolishing it entirely throughout her extensive dominions. But indeed, were capital punishments proved by experience to be a sure and effectual remedy, that would not prove the necessity (upon which the justice and propriety depend) of inflicting them upon all occasions when other expedients fail, I fear this reasoning would extend a great deal too far. For instance, the damage done to our public roads by loaded wagons is universally allowed, and many laws have been made to prevent it ; none of which have hitherto proved effectual. But it does not therefore follow that it would be just for the legislature to inflict death upon every obstinate carrier, who defeats or eludes the provision of former statutes. Where the evil to be prevented is not adequate to the violence of the preventive, a sovereign that thinks seriously can never justify such a law to the dictates of conscience and humanity. To shed the blood of our fellow-creature is a matter that requires the greatest deliberation and the fullest conviction of our own authority ; for life is the immediate gift of God to man ; which neither he can resign, nor can it be taken from him, unless by the command or permission of him who gave it ; either expressly revealed, or collected from the laws of nature or society by clear and indisputable demonstration.

I would not be understood to *deny* the right of the legislature in any country to enforce its own laws by the death of the transgressor, though persons of some abilities have *doubted* it; but only to suggest a few hints for the consideration of such as are, or may hereafter, become legislators. When a question arises, whether death may be lawfully inflicted for this or that transgression, the wisdom of the laws must decide it; and to this public judgment or decision all private judgments must submit; else there is an end of the first principle of all society and government. The guilt of blood, if any, must lie at their doors, who misinterpret the extent of their warrant; and not at the doors of the subject, who is bound to receive the interpretations that are given by the sovereign power.

2. As to the *end* or final cause of human punishments. This is not by way of atonement or expiation for the crime committed; for that must be left to the just determination of the Supreme Being; but as a precaution against future offences of the same kind. This is effected three ways: either by the amendment of the offender himself; for which purpose all corporeal punishments, fines, and temporary exile or imprisonment are inflicted: or, by deterring others by the dread of his example from offending in the like way, "*ut poena* (as Tully expresses it) *ad paucos, metus ad omnes, perveniat*;" which gives rise to all ignominious punishments, and to such executions of justice as are open and public: or, lastly, by depriving the party injuring of the power to do future mischief: which is effected by either putting him to death, or condemning him to perpetual confinement, slavery, or exile. The same one end, of preventing future crimes, is endeavored to be answered by each of these three species of punishment. The public gains equal security, whether the offender himself be amended by wholesome correction, or whether he be disabled from doing any further harm: and if the penalty fails of both these effects, as it may do, still the terror of his example remains as a warning to other citizens. The method however of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it: therefore the pains of death, and perpetual disability by exile, slavery or imprisonment, ought never to be inflicted, but when the offender appears incorrigible: which may be collected

either from a repetition of minuter offences : or from the perpetration of some one crime of deep malignity, which of itself demonstrates a disposition without hope or probability of amendment : and in such cases it would be cruelty to the public to defer the punishment of such a criminal, till he had an opportunity of repeating perhaps the worst of villanies.

3. As to the *measure* of human punishments. From what has been observed in the former articles we may collect, that the quantity of punishment can never be absolutely determined by any standing invariable rule ; but it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear to be the best calculated to answer the end of precaution against future offences.

Hence it will be evident, that what some have so highly extolled for its equity, the *lex talionis*, or law of retaliation, can never be in all cases an adequate or permanent rule of punishment. In some cases indeed it seems to be dictated by natural reason ; as in the case of conspiracies to do an injury, or false accusations of the innocent : to which we may add that law of the Jews and Egyptians, mentioned by Josephus and Diodorus Siculus, that whoever without sufficient cause was found with any mortal poison in his custody, should himself be obliged to take it. But, in general, the difference of persons, place, time, provocation, or other circumstances, may enhance or mitigate the offence ; and in such cases retaliation can never be a proper measure of justice. If a nobleman strikes a peasant, all mankind will see, that if a court of justice awards a return of the blow, it is more than a just compensation. On the other hand, retaliation may, sometimes, be too easy a sentence ; as, if a man maliciously should put out the remaining eye : of him who had lost one before, it is too slight a punishment for the maimer to lose only one of his : and therefore the law of the Locrians, which demanded an eye for an eye, was in this instance judiciously altered by decreeing, in imitation of Solon's laws, that he who struck out the eye of a one-eyed man, should lose both his own in return. Besides, there are very many crimes, that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery

by adultery, and the like. And we may add, that those instances, wherein retaliation appears to be used, even by the divine authority, do not really proceed upon the rule of exact retribution, by doing to the criminal the same hurt he has done to his neighbor, and no more; but this correspondence between the crime and punishment is barely a consequence from some other principle. Death is ordered to be punished with death; not because one is equivalent to the other, for that would be expiation, and not punishment. Nor is death always an equivalent for death: the execution of a needy decrepit assassin is a poor satisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honors and his fortune. But the reason upon which this sentence is grounded seems to be, that this is the highest penalty that man can inflict, and tends most to the security of mankind; by removing one murderer from the earth, and setting a dreadful example to deter others: so that even this grand instance proceeds upon other principles than those of retaliation. And truly, if any measure of punishment is to be taken from the damage sustained by the sufferer, the punishment ought rather to exceed than equal the injury: since it seems contrary to reason and equity, that the guilty (if convicted) should suffer no more than the innocent has done before him: especially as the suffering of the innocent is past and irrevocable, that of the guilty is future, contingent, and liable to be escaped or evaded. With regard indeed to crimes that are incomplete, which consist merely in the intention, and are not yet carried into act, as conspiracies and the like; the innocent has a chance to frustrate or avoid the villainy, as the conspirator has also a chance to escape his punishment: and this may be one reason why the *lex talionis* is more proper to be inflicted, if at all, for crimes that consist in intention, than for such as are carried into act. It seems indeed consonant to natural reason, and has therefore been adopted as a maxim by several theoretical writers, that the punishment due to the crime of which one falsely accuses another, should be inflicted on the perjured informer. Accordingly, when it was once attempted to introduce into England the law of retaliation, it was intended as a punishment for such only as preferred malicious accusations against others; it being enacted by statute 37 Edw. III., ch. 18, that such as preferred any suggestions to

the king's great council should put in sureties of taliation ; that is, to incur the same pain that the other should have had, in case the suggestion were found untrue. But, after one year's experience, this punishment of taliation was rejected, and imprisonment adopted in its stead.

But though from what has been said it appears, that there cannot be any regular or determinate method of rating the quantity of punishments for crimes, by any one uniform rule ; but they must be referred to the will and discretion of the legislative power ; yet there are some general principles, drawn from the nature and circumstances of the crime, that may be of some assistance in allotting it an adequate punishment.

As, first, with regard to the *object* of it ; for the greater and more exalted the object of an injury is, the more care should be taken to prevent that injury, and of course under this aggravation the punishment should be more severe. Therefore treason in conspiring the *king's* death is by the English law punished with greater rigor than even actually killing any private subject. And yet, generally, a design to transgress is not so flagrant an enormity as the actual completion of that design. For evil, the nearer we approach it, is the more disagreeable and shocking ; so that it requires more obstinacy in wickedness to perpetrate an unlawful action, than barely to entertain the thought of it : and it is an encouragement to repentance and remorse, even till the last stage of any crime, that it never is too late to retract ; and that if a man stops even here, it is better for him than if he proceeds : for which reason an attempt to rob, to ravish, or to kill, is far less penal than the actual robbery, rape, or murder. But in the case of a treasonable conspiracy, the object whereof is the king's majesty, the bare intention will deserve the highest degree of severity ; not because the intention is equivalent to the act itself : but because the greatest rigor is no more than adequate to a treasonable purpose of the heart, and there is no greater left to inflict upon the actual execution itself.

Again : the violence of passion, or temptation, may sometimes alleviate a crime ; as theft, in case of hunger, is far more worthy of compassion than when committed through avarice, or to supply one in luxurious excesses. To kill a man upon sudden and violent resentment, is less penal than upon cool deliberate

malice. The age, education, and character of the offender ; the repetition (or otherwise) of the offense ; the time, the place, the company wherein it was committed ; all these, and a thousand other incidents, may aggravate or extenuate the crime.

Further : as punishments are chiefly intended for the prevention of future crimes, it is but reasonable that among crimes of different natures those should be most severely punished, which are among the most destructive of the public safety and happiness ; and, among crimes of an equal malignity, those which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others, and which therefore the offender has the strongest inducement to commit ; according to what Cicero observes, "*ea sunt animadvertenda peccata maxime, quæ difficillime præcaventur.*"

Lastly : as a conclusion to the whole, we may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity. It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action, that crimes are more effectually prevented by the *certainty*, than by the *severity*, of punishment. For the excessive severity of laws (says Montesquieu) hinders their execution ; when the punishment surpasses all measure, the public will frequently out of humanity prefer impunity to it. Thus also the statute 1 Mar. st. 1, ch. 1, recites in its preamble, "that the state of every king consists more assuredly in the love of the subject towards their prince, than in the dread of laws made with rigorous pains ; and that laws made for the preservation of the commonwealth without great penalties are more often obeyed and kept, than laws made with extreme punishments." Happy had it been for the nation, if the subsequent practice of that deluded princess in matters of religion, had been correspondent to these sentiments of herself and parliament, in matters of State and government ! We may further observe that sanguinary laws are a bad symptom of the distemper of any State, or at least of its weak constitution. The laws of the Roman kings, and the twelve tables of the *decemviri*, were full of cruel punishments ; the Porcian law, which exempted all citizens from sentence of death, silently ab-

rogated them all. In this period the republic flourished ; under the emperors severe punishments were revived ; and then the empire fell.

It is moreover absurd and impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them) do likewise prove a manifest defect either in the wisdom of the legislative, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty. It is, it must be owned, much *easier* to extirpate than to amend mankind : yet that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure. It has been therefore ingeniously proposed, that in every State a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least : but, if that be too romantic an idea, yet at least a wise legislator will mark the principal divisions, and not assign penalties of the first degree to offences of an inferior rank. Where men see no distinction made in the nature and gradations of punishment, the generality will be led to conclude there is no distinction in the guilt. Thus in France the punishment of robbery, either with or without murder, is the same : hence it is, that though perhaps they are therefore subject to fewer robberies, yet they never rob but they also murder. In China, murderers are cut to pieces, and robbers not : hence in that country they never murder on the highway, though they often rob. And in England, besides the additional terrors of a speedy execution, and a subsequent exposure or dissection, robbers have a hope of transportation, which seldom is extended to murderers. This has the same effect here as in China : in preventing frequent assassination and slaughter.

Yet, though in this instance we may glory in the wisdom of the English law, we shall find it more difficult to justify the frequency of capital punishment to be found therein ; inflicted (perhaps inattentively) by a multitude of successive independent statutes, upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than a hundred and sixty have

been declared by act of parliament to be felonies without benefit of clergy ; or, in other words, to be worthy of instant death. So dreadful a list, instead of diminishing, increases the number of offenders.³ The injured through compassion, will often forbear to prosecute ; juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offense ; and judges, through compassion, will respite one half of the convicts, and recommend them to the royal mercy. Among so many chances of escaping, the needy and hardened offender overlooks the multitude that suffer : he boldly engages in some desperate attempt, to relieve his wants or supply his vices : and, if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate, in falling at last a sacrifice to those laws, which long impunity has taught him to contemn.

CHAPTER II.

[BL. COMM.—BOOK IV. CH. II.]

Of the Persons capable of Committing Crimes.

HAVING, in the preceding chapter, considered in general the nature of crimes and punishments, we are led next, in the order of our distribution to inquire what persons are, or are not, *capable* of committing crimes : or which is all one, who are exempted from the censures of the law upon the commission of those acts, which in other persons would be severely punished. In the process of which inquiry, we must have recourse to particular and special exceptions : for the general rule is, that no person shall be excused from punishment for disobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves.

All the several pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of *will*. An involuntary act, as it has no claim

³ See *ante* note 1.

to merit, so neither can it induce any guilt : the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act. For, though, *in foro conscientiae*, a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason in all temporal jurisdictions an *overt* act, or some open evidence of an intended crime, is necessary in order to demonstrate the depravity of the will before the man is liable to punishment. And, as a vicious will, without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will ; and, secondly, an unlawful act consequent upon such vicious will.

Now there are three cases, in which the will does not join with the act : 1. Where there is a defect of understanding. For where there is no discernment, there is no choice ; and where there is no choice, there can be no act of the will, which is nothing else but a determination of one's choice to do or to abstain from a particular action ; he, therefore, that has no understanding, can have no will to guide his conduct. 2. Where there is understanding and will sufficient, residing in the party ; but not called forth and exerted at the time of the action done ; which is the case of all offences committed by chance or ignorance. Here the will sits neuter ; and neither concurs with the act, nor disagrees to it. 3. Where the action is constrained by some outward force and violence. Here the will counteracts the deed ; and is so far from concurring with, that it loaths and disagrees to, what the man is obliged to perform. It will be the business of the present chapter briefly to consider all the several species of defect in will, as they fall under some one or other of these general heads : as infancy, idiocy, lunacy, and intoxication, which fall under the first class ; misfortune, and ignorance, which may be referred to the second ; and compulsion or necessity, which may properly rank in the third.

I. First, we will consider the case of *infancy*, or nonage ; which is a defect of the understanding. Infants, under the age of discretion, ought not to be punished by any criminal prosecution whatever. What the age of discretion is, in various nations, is matter of some variety. The civil law distinguished the age of minors, or those under twenty-five years old, into three stages : *infantia*, from the birth till seven years of age ; *pueritia*, from seven to fourteen ; and *pubertas*, from fourteen upwards. The period of *pueritia*, or childhood, was again subdivided into two equal parts : from seven to ten and a half was *ætas infantie proxima* ; from ten and a half to fourteen was *ætas pubertati proxima*. During the first stage of infancy, and the next half stage of childhood, *infantie proxima*, they were not punishable for any crime. During the other half stage of childhood, approaching to puberty, from ten and an half to fourteen, they were indeed punishable, if found to be *doli capaces*, or capable of mischief : but with many mitigations, and not with the utmost rigor of the law. During the last stage (at the age of puberty, and afterwards), minors were liable to be punished, as well capitally, as otherwise.

The law of England does in some cases privilege an infant, under the age of twenty-one, as to common misdemeanors, so as to escape fine, imprisonment, and the like : and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offences ; for, not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like (which infants, when full grown, are at least as liable as others to commit), for these an infant, above the age of fourteen, is equally liable to suffer, as a person of the full age of twenty-one.

With regard to capital crimes, the law is still more minute and circumspect ; distinguishing with greater nicety the several degrees of age and discretion. By the ancient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open ; and from thence till the offender was fourteen, it was *ætas pubertati proxima*, in which he might or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion : but, under twelve it was held that he could

not be guilty in will, neither after fourteen could he be supposed innocent, of any capital crime which he in fact committed. But by the law, as it now stands, and has stood at least ever since the time of Edward the Third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is, that "*malitia supplet ætatem.*" Under seven years of age indeed an infant cannot be guilty of felony; for then a felonious discretion is almost an impossibility in nature: but at eight years old he may be guilty of felony. Also, under fourteen, though an infant shall be *prima facie* adjudged to be *doli incapax*; yet if it appear to the court and jury, that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. Thus a girl of thirteen has been burnt for killing her mistress: and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged; because it appeared upon their trials, that the one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil. And there was an instance in the last century where a boy of eight years old was tried at Abingdon for firing two barns; and, it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly. Thus also, in very modern times a boy of ten years old was convicted on his own confession of murdering his bed-fellow, there appearing in his whole behavior plain tokens of a mischievous discretion; and, as the sparing this boy merely on account of his tender years might be of dangerous consequences to the public by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment. But, in all such cases, the evidence of that malice which is to supply age, ought to be strong and clear beyond all doubt and contradiction.¹

¹ The established law of this country is the same; viz., that an infant under seven is conclusively presumed incapable of committing a felony; that, when he is between seven and fourteen, affirmative proof must be adduced to establish the fact of capacity (*Angelo v. People*, 96 Ill. 209; see 90 Mo. 112; 75

II. The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, *viz.*, in an *idiot* or a *lunatic*. For the rule of law as to the latter, which may easily be adapted also to the former, is, that "*furiosus furore solum punitur*." In criminal cases therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution. Indeed, in the bloody reign of Henry the Eighth, a statute was made, which enacted, that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute 1 & 2 Ph. & M. ch. 10. For, as is observed by Sir Edward Coke, "the execution of an offender is for example, *ut pœna ad paucos, metus ad omnes perveniat*: but so it is not when a madman is executed; but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others." But if there be any doubt, whether the party be *compos* or not, this shall be tried by a jury. And if he be so found, a total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the

Va. 885); that, when he is over fourteen, he is presumed to have sufficient capacity, being classed with adults in regard to criminal responsibility. But now in New York the age of fourteen in these rules is changed to twelve. (Penal Code, §§ 17, 20.) It is a general rule that a boy under fourteen is incapable of committing a rape; but it is held in some States that this is not a conclusive, but only a disputable presumption, which may be rebutted by proof of sexual capacity. (*People v. Randolph*, 2 Parker, 213; 14 Ohio, 222; 39 La. Ann. 935; 84 Ky. 457.)

senses: but, if a lunatic hath lucid intervals of understanding, he shall answer for what he does in those intervals as if he had no deficiency. Yet in the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting unless under proper control; and, in particular, they ought not to be suffered to go loose, to the terror of the king's subjects. It was the doctrine of our ancient law, that persons deprived of their reason might be confined till they recovered their senses, without waiting for the forms of a commission or other special authority from the crown: and now, by the vagrant acts, a method is chalked out for imprisoning, chaining, and sending them to their proper homes.²

² The leading authority upon the subject of criminal responsibility, as affected by insanity, is *M'Naughten's Case*, (10 Clark & Finnelly, 200; 1 C. & K. 129), in which the opinion of the whole body of judges of the common-law courts was taken and referred to the House of Lords, by which it was subsequently sustained. The principles established by this opinion upon this subject, have remained the law of England until the present day, and have been adopted in many States of this country. The propositions established by this decision are as follows: "The jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong." It was further declared that, if the accused labors under a partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility, as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. But if the mistaken belief would not, if true, justify the act, he must be held responsible.

These rules as to both total and partial insanity are also the generally prevailing law in this country upon the subject (*Guiteau's Case*, 10 Fed. Rep. 161; *Comm. v. Rogers*, 7 Metc. 500; *Willis v. People*, 32 N. Y. 715; *People v. Horn*, 62 Cal. 120; *State v. Erb*, 74 Mo. 199; *Taylor v. Comm.* 109 Pa. St. 262), though some States adopt different doctrines in whole or in part. (*State v. Jones*, 50 N. H. 369; *Parsons v. State*, 81 Ala. 577.) Examples of partial delusion occur in cases of monomania; and if the particular form of such delusion does not render a person incapable of understanding the wrongful nature of the act he commits, he may be adjudged responsible, but otherwise not. (*State v. Nixon*, 32 Kan. 207; *State v. Geddes*, 42 Ia. 264; *U. S. v. Ridgeway*, 31 Fed. Rep. 144; *People v. Sprague*, 2 Parker, 43.)

III. Thirdly ; as to artificial, voluntarily contracted madness, by *drunkenness* or intoxication, which, depriving men of their reason, puts them in a temporary frenzy ; our law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehavior. A drunkard, says Sir Edward Coke, who is *voluntarius dæmon*, hath no privilege thereby ; but what hurt or ill soever he doth, his drunkenness doth aggravate it : *nam omne crimen ebrietas, et incendit, et detegit*. It hath been observed, that the real use of strong liquors, and the abuse of them by drinking to excess, depend much upon the temperature of the climate in which we live. The same indulgence, which may be necessary to make the blood move in Norway, would make an Italian mad. A German therefore, says the president Montesquieu, drinks through custom, founded upon constitutional necessity ; a Spaniard drinks through choice, or out of the mere wan-

The question has recently arisen for decision, whether this criterion is a sufficient and proper test of responsibility, when the accused is shown to have been capable of distinguishing between right and wrong at the time of the act, but was urged by an irresistible impulse to commit the offense. Among medical writers, a form of insanity is recognized, in which the faculties are so disordered that a man, though he perceives the moral quality of his acts, is unable to control them, and is urged by some mysterious pressure to the commission of acts, the consequences of which he anticipates, but cannot avoid. But it has been held in some States that this doctrine has no application in law, as a limitation of criminal responsibility. "The law recognizes no form of insanity," it is declared, "in which the capacity of distinguishing right from wrong exists, without the power of choosing between them." The vagueness and uncertainty of this inquiry are deemed to render the doctrine dangerous. (52 N. Y. 467 ; 62 Cal. 120 ; 92 Mo. 300 ; 32 Kan. 205 ; 25 Fed. Rep. 710.) But some States adopt a contrary view when the irresistible impulse is due to mental disease and not merely to a perverted moral or emotional nature. (40 Conn. 136 ; 81 Ala. 577 ; 46 Ia. 88 ; 109 Pa. St. 262 ; 109 Ill. 635 ; 75 Va. 867.) A morbid perversion of the feelings, affections, or moral nature, unconnected with disease of the mind, is sometimes called "moral or emotional insanity," but no such form of insanity is deemed a defense for crime. (Id. ; 94 Ind. 147 ; 81 Ky. 357 ; 10 Fed. Rep. 183 ; 69 Md. 28.)

Every person is presumed to be sane until the contrary be shown. The fact of insanity must, therefore, be established by affirmative evidence, the burden of proof resting upon the defendant. But in some States it is held that if the entire evidence, including that given on the prisoner's behalf, does not satisfy the jury of his sanity beyond a reasonable doubt, he is entitled to acquittal. (*Walker v. People*, 88 N. Y. 81 ; 32 Kan. 205 ; 43 N. H. 224 ; 10 Fed. Rep. 161.) In many States, however, the defendant must prove his insanity by a preponderance of evidence, in order to be acquitted. (57 Me. 574 ; 62 Cal. 377 ; 100 Pa. St. 573 ; 45 N. J. L. 203 & 347.)

tonness of luxury : and drunkenness, he adds, ought to be more severely punished, where it makes men mischievous and mad, as in Spain and Italy, than where it only renders them stupid and heavy, as in Germany and more northern countries. And accordingly, in the warm climate of Greece, a law of Pittacus enacted, "that he who committed a crime when drunk, should receive a double punishment," one for the crime itself, and the other for the ebriety which prompted him to commit it. The Roman law indeed made great allowances for this vice : "*per vinum delapsis capitalis pœna remittitur.*" But the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is (though real), will not suffer any man thus to privilege one crime by another.³

IV. A fourth deficiency of will, is where a man commits an unlawful act by *misfortune* or *chance*, and not by design. Here the will observes a total neutrality, and does not co-operate with the deed ; which therefore wants one main ingredient of a crime. Of this, when it affects the life of another, we shall find more occasion to speak hereafter ; at present only observing, that if any accidental mischief happens to follow from the performance of a *lawful* act, the party stands excused from all guilt : but if a man be doing anything *unlawful*, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse ; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehavior.⁴

³ It is a well established rule of law, that voluntary intoxication furnishes no excuse for crime, though it may blunt the moral perceptions, and greatly disorder the mental faculties. This doctrine is founded upon salutary considerations of public policy ; since, if a different rule were established, a convenient means of escaping responsibility would be afforded to those disposed to commit crime. If drunkenness excused crime, it would be the usual preliminary to criminal acts. If, however, habits of intemperance have produced a state of actual insanity, the rule applicable in other cases of insanity to determine responsibility, will be applicable. (*Kenny v. People*, 31 N. Y. 330 ; *People v. Rogers*, 18 N. Y. 9 ; *Upstone v. People*, 109 Ill. 169.) Moreover, if a specific intent be a necessary element in a particular crime, evidence of intoxication is admissible, to show that such an intent could not have been entertained, and thus to change the nature or grade of the offense for which the prisoner may be convicted. (*Hopt v. People*, 104 U. S. 631 ; *State v. Johnson*, 41 Ct. 584 ; see 43 O. St. 332 ; 86 N. Y. 554.)

⁴ If the wrongful act be attributable to *carelessness*, or *negligence*, the per-

V. Fifthly: *ignorance* or *mistake* is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law. As if a man, intending to kill a thief or house-breaker in his own house, by mistake kills one of his own family, this is no criminal action; but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so, this is wilful murder. For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is as well the maxim of our own law, as it was of the Roman.⁶

VI. A sixth species of defect of will is that arising from *compulsion* and inevitable *necessity*. These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will, which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.

I. Of this nature, in the first place, is the obligation of *civil subjection*, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest; as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality. How far this excuse will be admitted *in foro conscientiæ*, or whether the inferior in this case is not bound to obey the depetrator will generally be criminally responsible. Thus, if a person, while engaged in doing a lawful act, acts so recklessly and imprudently as to occasion a person's death, he will be subject to indictment therefor; as if one drives carelessly in a crowded street, and fatally injures a by-stander. But when a specific, actual intent is necessarily involved in a certain crime, mere negligence will not be sufficient to render the accused criminally liable; thus, merely a negligent taking of another's goods will not constitute larceny, since this offense involves an intent to steal and to convert the property to one's own use. (See *Comm. v. Pierce*, 138 Mass. 165; also 103 N. Y. 487.)

⁶ As to ignorance of fact, see *Queen v. Tolson*, 23 Q. B. D. 168; also 14 Gray, 65; 107 Ind. 483; as to ignorance of law, *Hamilton v. People*, 57 Barb. 625; *State v. Goodenow*, 65 Me. 30. But ignorance of fact does not excuse, when a statute creates an absolute liability, irrespective of such ignorance. (143 Mass. 132; 62 Ia. 400; 106 N. Y. 321.)

vine, rather than the human law, it is not my business to decide ; though the question, I believe, among the casuists, will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The sheriff, who burnt Latimer and Ridley, in the bigoted days of Queen Mary, was not liable to punishment from Elizabeth, for executing so horrid an office ; being justified by the commands of that magistracy, which endeavored to restore superstition under the holy auspices of its merciless sister, persecution.

As to persons in private relations ; the principal case, where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband ; for neither a son nor a servant are excused for the commission of any crime whether capital or otherwise, by the command or coercion of the parent or master ; though in some cases the command or authority of the husband, either expressed or implied, will privilege the wife from punishment, even for capital offences. And, therefore, if a woman commit theft, burglary, or other civil offences against the laws of society, by the coercion of her husband ; or even in his company, which the law construes a coercion ; she is not guilty of any crime ; being considered as acting by compulsion and not of her own will.⁶ Which doctrine is at least a thousand years old in this kingdom, being to be found among the laws of king Ina, the West Saxon. And it appears that among the Northern nations on the continent, this privilege extended to any woman transgressing in concert with a man, and to any servant that committed a joint offence with a freeman ; the male or freeman only was punished, the female or slave dismissed ; "*procul dubio quod alterum libertas, alterum necessitas impelleret.*" But (besides that in our law, which is a stranger to slavery, no impunity is given to servants, who are as much free agents as their masters) even with regard

⁶ But the presumption that a crime committed by a wife, in the presence of her husband, is done by his coercion, is not conclusive, but open to rebuttal by evidence that the offense was exclusively of her own commission. "Thus, if the husband were a cripple, and confined to his bed, his presence would not be sufficient to exonerate the wife." (Russell on Crimes, vol. i. 22.) (See 97 N. Y. 126; 148 Mass. 11; 13 R. I. 535, 537.) The exemption of the wife does not, in any case, extend to crimes of the graver class, such as treason, murder, and perhaps robbery; and now in New York it is altogether abolished. (Penal Code, § 24.)

to wives, this rule admits of an exception in crimes that are *mala in se*, and prohibited by the law of nature, as murder and the like; not only because these are of a deeper dye, but also, since in a state of nature no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society. In treason also (the highest crime which a member of society can, as such, be guilty of), no plea of coverture shall excuse the wife; no presumption of the husband's coercion shall extenuate her guilt; as well, because of the odiousness and dangerous consequences of the crime itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the state, has no right to that obedience from a wife, which he himself as a subject has forgotten to pay. In inferior misdemeanors also we may remark another exception; that a wife may be indicted and set in the pillory *with* her husband, for keeping a brothel; for this is an offence touching the domestic economy or government of the house, in which the wife has a principal share; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex.† And in all cases, where the wife offends alone, without the company or coercion of her husband she is responsible for her offence, as much as any feme-sole.

2. Another species of compulsion or necessity is what our law calls *duress per minas*; or threats and menaces, which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemeanors; at least before the human tribunal. But then that fear which compels a man to do an unwarrantable action, ought to be just and well-grounded; such "*qui cadere possit in virum constantem, non timidum et meticulosum*," as Bracton expresses it, in the words of the civil law. Therefore, in time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace. This however seems only, or at least principally, to hold as to positive crimes, so created by the laws of society; and which, therefore, society may excuse; but not as to natural offences so declared by the law of God, wherein human magistrates are only the executioners of divine punishment. And therefore though a man be violently assaulted, and hath no other

† See *Comm. v. Lewis*, 1 Metc. 151; *Comm. v. Hopkins*, 133 Mass. 381; *State v. Bentz*, 11 Mo. 27.

possible means of escaping death, but by killing an innocent person; this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent. But in such a case he is permitted to kill the assailant; for there the law of nature, and self-defence, its primary canon, have made him his own protector.

3. There is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection, which act upon and constrain a man's will, and oblige him to do an action, which without such obligation would be criminal. And that is, when a man has his choice of two evils set before him, and, being under a necessity of choosing one, he chooses the least pernicious of the two. Here the will cannot be said freely to exert itself, being rather passive than active; or, if active, it is rather in rejecting the greater evil than in choosing the less. Of this sort is that necessity, where a man by the commandment of the law is bound to arrest another for any capital offence, or to disperse a riot, and resistance is made to his authority: it is here justifiable and even necessary to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to escape, or the riot to continue. For the preservation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost consequence to the public; and therefore excuse the felony, which the killing would otherwise amount to.

4. There is yet another case of necessity, which has occasioned great speculation among the writers upon general law; *viz.*, whether a man in extreme want of food or clothing may justify stealing either, to relieve his present necessities? And this both Grotius and Puffendorf, together with many other of the foreign jurists, hold in the affirmative; maintaining by many ingenious, humane, and plausible reasons, that in such cases the community of goods, by a kind of tacit confession of society, is revived. And some even of our own lawyers have held the same, though it seems to be an unwarranted doctrine, borrowed from the notions of some civilians: at least it is now antiquated, the law of England admitting no such excuse at present. And this its doctrine is agreeable not only to the sentiments of many of the wisest ancients, particularly Cicero, who holds that "*suum cuique incommodum ferendum est, potius quam de alterius commodis detrahen-*

dum ;” but also to the Jewish law, as certified by king Solomon himself : “ if a thief steal to satisfy his soul when he is hungry, he shall restore seven-fold, and shall give all the substance of his house :” which was the ordinary punishment for theft in that kingdom. And this is founded upon the highest reason : for men’s properties would be under a strange insecurity, if liable to be invaded according to the wants of others, of which wants no man can possibly be an adequate judge, but the party himself who pleads them. In this country especially, there would be a peculiar impropriety in admitting so dubious an excuse : for by our laws such sufficient provision is made for the poor by the power of the civil magistrate, that it is impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature. This case of a stranger is, by the way, the strongest instance put by Baron Puffendorf, and whereon he builds his principal arguments : which, however they may hold upon the continent, where the parsimonious industry of the natives orders every one to work or starve, yet must lose all their weight and efficacy in England, where charity is reduced to a system, and interwoven in our very constitution. Therefore our laws ought by no means to be taxed with being unmerciful for denying this privilege to the necessitous ; especially when we consider, that the king, on the representation of his ministers of justice, hath a power to soften the law, and to extend mercy in cases of peculiar hardship. An advantage which is wanting in many States, particularly those which are democratical ; and these have in its stead introduced and adopted, in the body of the law itself, a multitude of circumstances tending to alleviate its rigor. But the founders of our constitution thought it better to vest in the crown the power of pardoning particular objects of compassion, than to countenance and establish theft by one general undistinguishing law.

VII. To these several cases, in which the incapacity of committing crimes arises from a deficiency of the will, we may add one more, in which the law supposes an incapacity of doing wrong, from the excellence and perfection of the person ; which extend as well to the will as to the other qualities of his mind. I mean the case of the king ; who, by virtue of his royal prerogative, is not under the coercive power of the law ; which will not suppose him capable of committing a folly, much less a crime

We are therefore, out of reverence and decency, to forbear any idle inquiries, of what would be the consequence if the king were to act thus and thus : since the law deems so highly of his wisdom and virtue, as not even to presume it possible for him to do any thing inconsistent with his station and dignity ; and therefore has made no provision to remedy such a grievance.

CHAPTER III.

[BL. COMM.—BOOK IV. CH. III.]

Of Principals and Accessories.

It having been shown in the preceding chapter what persons are, or are not, upon account of their situation and circumstances, capable of committing crimes, we are next to make a few remarks on the different degrees of guilt among persons that are capable of offending ; viz., as *principal*, and as *accessory*.

I. A man may be *principal* in an offence in two degrees. A principal, in the first degree, is he that is the actor, or absolute perpetrator of the crime ; and, in the second degree, he who is present, aiding and abetting the fact to be done. Which *presence* need not always be an actual immediate standing by, within sight or hearing of the fact ; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance.† And this rule hath also other exceptions : for, in case of murder by poisoning, a man may be a principal felon by preparing and laying the poison, or persuading another to drink it who is ignorant of its poisonous quality, or giving it to him for that purpose ; and yet not administer it himself, nor be present when the very deed of poisoning is committed. And the same reasoning will hold, with regard to other murders committed in the absence of the murderer, by means which he had prepared beforehand, and which probably could not fail of their mischievous effect. As by laying a trap or pitfall for another, whereby he is killed : letting out a wild beast, with an intent to do mischief, or inciting a madman to commit murder, so that death thereupon ensues ; in

† See *McCarney v. People*, 83 N. Y. 408 ; *Stephens v. State*, 42 O. St. 150 ; *State v. Allen*, 47 Conn. 121.

every one of these cases the party offending is guilty of murder as a principal, in the first degree. For he cannot be called an accessory, that necessarily presupposing a principal : and the poison, the pitfall, the beast, or the madman, cannot be held principals, being only the instruments of death. As therefore he must be certainly guilty either as principal or accessory, and cannot be so as accessory, it follows that he must be guilty as principal, and if principal, then in the first degree ; for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist.

II. An *accessory* is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either *before* or *after* the fact committed. In considering the nature of which degree of guilt, we will, first, examine, what offences admit of accessories, and what not : secondly, who may be an accessory *before* the fact : thirdly, who may be an accessory *after* it : and, lastly, how accessories, considered merely as such, and distinct from principals, are to be treated.

I. And, first, as to what offences admit of accessories, and what not. In high treason there are no accessories, but all are principals : the same acts, that make a man accessory in felony, making him a principal in high treason, upon account of the heinousness of the crime. Besides it is to be considered, that the bare intent to commit treason is many times actual treason : as imagining the death of the king, or conspiring to take away his crown. And, as no one can advise and abet such a crime without an intention to have it done, there can be no accessories before the fact ; since the very advice and abetment amount to principal treason. But this will not hold in the inferior species of high treason, which do not amount to the legal idea of compassing the death of the king, queen, or prince. For in those no advice to commit them, unless the thing be actually performed, will make a man a principal traitor. In murder, and felonies with or without benefit of clergy there may be accessories : except only in those offences, which by judgment of law are sudden and unpremeditated, as manslaughter and the like ; which therefore cannot have any accessories *before* the fact. So, too, in petit larceny, and in all crimes under the degree of felony, there are no accessories either *before* or *after* the fact ; but all persons concerned therein, if guilty at all, are principals : the same rule

holding with regard to the highest and lowest offences, though upon different reasons.¹ In treason all are principals, *propter odium delicti*; in trespass all are principals, because the law, *quæ de minimis non curat*, does not descend to distinguish the different shades of guilt in petty misdemeanors. It is a maxim, that *accessorius sequitur naturam sui principalis*: and therefore an accessory cannot be guilty of a higher crime than his principal; being only punished as a partaker of his guilt. So that if a servant instigates a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder; though, had he been present and assisting, he would have been guilty as principal of petit treason, and the stranger of murder.²

2. As to the second point, who may be an accessory *before* the fact, sir Matthew Hale defines him to be one, who being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessory: for if such procurer, or the like, be present, he is guilty of the crime as principal.³ If A then advises B to kill another, and B does it in the absence of A, now B is principal, and A is accessory in the murder. And this holds, even though the party killed be not *in rerum naturâ* at the time of the advice given. As if A, the reputed father, advises B, the mother of a bastard child, unborn, to strangle it when born, and she does so; A is accessory to this murder. And it is also settled, that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact. It is likewise a rule, that he who in any wise com-

¹ See *Ward v. People*, 3 Hill, 395; *People v. Erwin*, 4 Denio, 129; *Lowenstein v. People*, 54 Barb. 299.

² The crime of petit treason is now abolished.

³ A person who procures the commission of a crime through the instrumentality of an innocent agent, who does not understand the criminality of the act he performs, is responsible as principal, and the agent is excused; as, if one instigates an idiot, or lunatic, or an infant of tender years, to perpetrate some deed of crime, which is committed without knowledge of its guilt; or, if one mixes poison with a patient's medicine, and causes it to be administered by a nurse, who acts innocently, without knowledge of the fact. But if the agent be guilty, the absent employer is only an accessory. (See *People v. McMurray*, 4 Parker, 234; *Wixson v. People*, 5 Id. 119; *People v. Kats*, 23 How. Pr. 93; *Comm. v. Hick*, 11 Mass. 136.)

mands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act; but is not accessory to any act distinct from the other. And if A commands B to beat C, and B beats him so that he dies: B is guilty of murder as principal, and A as accessory. But if A commands B to burn C's house; and he, in so doing, commits a robbery; now A, though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and un consequential nature. But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison Titius, he is stabbed or shot, and dies: the commander is still accessory to the murder, for the substance of the thing commanded was the death of Titius, and the manner of its execution is a mere collateral circumstance.

3. An accessory *after* the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. Therefore to make an accessory *ex post facto*, it is in the first place requisite that he knows of the felony committed. In the next place he must receive, relieve, comfort, or assist him. And generally any assistance whatever, given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assister an accessory. As furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him. So likewise to convey instruments to a felon to enable him to break jail, or to bribe the jailer to let him escape, makes a man an accessory to the felony. But to relieve a felon in jail with clothes or other necessities, is no offence; for the crime imputable to this species of accessory is the hinderance of public justice, by assisting the felon to escape the vengeance of the law. To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions; it was therefore at common law a mere misdemeanor, and made not the receiver accessory to the theft, because he received the *goods* only, and not the *felon*: but now by the statutes 5 Ann., ch. 31, and 4 Geo. I., ch. 11, all such receivers are made accessories (where the principal felony admits of accessories) and may be transported for fourteen years.

The felony must be complete at the time of the assistance given; else it makes not the assistant an accessory. As if one

wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent: this does not make him accessory to the homicide; for, till death ensues, there is no felony committed. But so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If the parent assists his child, or the child the parent, if the brother receives the brother, the master his servant or the servant his master, or even if the husband relieves his wife, who have any of them committed a felony, the receivers become accessories *ex post facto*. But a feme-covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her lord.

4. The last point of inquiry is, how accessories are to be treated, considered distinct from principals. And the general rule of the ancient law (borrowed from the Gothic constitutions) is this, that accessories shall suffer the same punishment as their principals: if one be liable to death, the other is also liable: as, by the laws of Athens, delinquents and their abettors were to receive the same punishment. Why then, it may be asked, are such elaborate distinctions made between accessories and principals, if both are to suffer the same punishment? For these reasons: 1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted; the commission of an actual robbery being quite a different accusation from that of harboring the robber. 2. Because, though by the ancient common law the rule is as before laid down, that both shall be punished alike, yet now by the statutes relating to the benefit of clergy, a distinction is made between them: accessories *after* the fact being still allowed the benefit of clergy in all cases, except horse-stealing and stealing of linen from bleaching-grounds: which is denied to the principals and accessories *before* the fact, in many cases; as, among others, in petit treason, murder, robbery, and wilful burning. And perhaps if a distinction were constantly to be made between the punishment of principals and accessories, even *before* the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed

itself ; as his danger would be greater than that of his accomplices, by reason of the difference of his punishment. 3. Because formerly no man could be tried as accessory till after the principal was convicted, or at least he must have been tried at the same time with him : though that law is now much altered, as will be shown more fully in its proper place. 4. Because, though a man be indicted as accessory and acquitted, he may afterwards be indicted as principal : for an acquittal of receiving or counselling a felon, is no acquittal of the felony itself : but it is matter of some doubt, whether, if a man be acquitted as principal, he can be afterwards indicted as accessory before the fact ; since those offences are frequently very nearly allied, and therefore an acquittal of the guilt of one may be an acquittal of the other also.⁴ But it is clearly held, that one acquitted as principal may be indicted as an accessory *after* the fact ; since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other. Upon these reasons the distinction of principal and accessory will appear to be highly necessary ; though the punishment is still much the same with regard to principals, and such accessories as offend *before* the fact is committed.⁵

⁴ But the weight of authority at common-law supports the view that, after an acquittal as principal, the prisoner may be indicted as accessory before the fact. The offenses are specifically different.

⁵ By the present English law, an accessory before the fact may be tried and convicted as if he were a principal felon ; and both they and accessories after the fact may be convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice. The tendency of legislation in the United States has been to make similar changes. But, in the absence of such statutory changes, the common-law rules in regard to the relative order of trials, are still generally in force. Now in New York principals of both degrees and accessories before the fact are called "principals" simply, while the name "accessories" is applied solely to accessories after the fact. (Penal Code §§ 29-32.)

It is a general rule that principals of both degrees, and accessories before the fact, are subjected to the same punishment ; but accessories after the fact receive lighter penalties, because they are not so much regarded as participating in the principal offense, but rather as interfering with the proper administration of justice.

CHAPTER IV.

[BL. COMM.—BOOK IV., CH. V.]

Of Offences against the Law of Nations.

ACCORDING to the method marked out in the preceding chapter,¹ we are next to consider the offences more immediately repugnant to that universal law of society, which regulates the mutual intercourse between one state and another ; those, I mean, which are particularly animadverted on, as such, by the English law.²

The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world ; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each. This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can ; and in time of war as little harm as possible, without prejudice to their own real interests. And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest ; but such rules must necessarily result from those

¹ In the preceding chapter (omitted in this edition), Blackstone has given the following classification of criminal offenses: "*First*, those which are more immediately injurious to God and His holy religion ; *secondly*, such as violate and transgress the law of nations ; *thirdly*, such as more especially affect the sovereign executive power of the State, or the king and his government ; *fourthly*, such as more directly infringe the rights of the public or commonwealth ; and, *lastly*, such as derogate from those rights and duties which are owing to particular individuals, and in the preservation and vindication of which the community is deeply interested." This omitted chapter treats of such offenses as are included under the first of these heads ; but as these relate peculiarly to the English ecclesiastical system, they are deemed of little importance to the American student.

² Offenses of this class are, in this country, within the jurisdiction of the federal courts, and not of the State tribunals.

principles of natural justice, in which all the learned of every nation agree ; or they depend upon mutual compacts or treaties between the respective communities ; in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject.

In arbitrary states this law, wherever it contradicts, or is not provided for by the municipal law of the country, is enforced by the royal power : but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductory of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom : without which it must cease to be a part of the civilized world. Thus in mercantile questions, such as bills of exchange and the like : in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature ; the law-merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So too in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.

But, though in civil transactions and questions of property between the subjects of different states, the law of nations has much scope and extent, as adopted by the law of England ; yet the present branch of our inquiries will fall within a narrow compass, as offences against the law of nations can rarely be the object of the criminal law of any particular state. For offences against this law are principally incident to whole states or nations ; in which case recourse can only be had to war ; which is an appeal to the God of Hosts, to punish such infractions of public faith, as are committed by one independent people against another : neither state having any superior jurisdiction to resort

to upon earth for justice. But where the individuals of any state violate this general law, it is then the interest as well as duty of the government, under which they live, to animadvert upon them with a becoming severity that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war. It is therefore incumbent upon the nation injured, first to demand satisfaction and justice to be done on the offender, by the state to which he belongs; and, if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war.

The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds: 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and 3. Piracy.

I. As to the first, *violation of safe-conducts or passports*, expressly granted by the king or his ambassadors to the subjects of a foreign power in time of mutual war; or committing acts of hostilities against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct: these are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another: and such offences may according to the writers upon the law of nations, be a just ground of a national war; since it is not in the power of the foreign prince to cause justice to be done to his subjects by the very individual delinquent, but he must require it of the whole community. And as during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law: and, more especially, as it is one of the articles of *magna charta*, that foreign merchants should be entitled to safe-conduct and security throughout the kingdom: there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king, whose honor is more particularly engaged in supporting his own safe-conduct.

II. As to the rights of *ambassadors*, which are also established by the law of nations, and are therefore matter of universal concern, they have formerly been treated of at large. It may here

be sufficient to remark, that the common law of England recognizes them in their full extent, by immediately stopping all legal process sued out through the ignorance or rashness of individuals, which may intrench upon the immunities of a foreign minister or any of his train.⁸ And, the more effectually to enforce the law of nations in this respect, when violated through wantonness or insolence, it is declared by the statute 7 Ann., ch. 12, that all process whereby the person of any ambassador, or of his domestic or domestic servant, may be arrested, or his goods distrained or seized, shall be utterly null and void; and that all persons prosecuting, soliciting, or executing such process, being convicted by confession or the oath of one witness, before the lord chancellor and the chief justices, or any two of them, shall be deemed violators of the laws of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the said judges, or any two of them shall think fit. Thus, in cases of extraordinary outrage, for which the law hath provided no special penalty, the legislature hath entrusted to the three principal judges of the kingdom an unlimited power of proportioning the punishment to the crime.

III. Lastly, the crime of *piracy*, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being according to Sir Edward Coke, *hostis humani generis*. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defence, to inflict that

⁸ It is an established principle of international law, that ambassadors are exempt from both the civil and criminal jurisdiction of the country to which they are accredited, and are amenable only to the jurisdiction of their own State. This is known as the doctrine of "extritoriality." This exemption extends also to the members of their household. Statutes have been passed by Congress, in this country, to secure the inviolability of ambassadors against violence, or the service of legal process, or against other violations of their public privileges. These laws are enforced in the United States courts. If an ambassador commits some gross or flagrant crime, the only remedy of the nation wherein he is resident in his official capacity is to send him beyond its borders, and commit him to the jurisdiction of the courts of his own country. The doctrine of extritoriality does not apply to consuls, unless by force of treaty stipulations. (See U. S. Rev. St., §§ 687, 4062-4064.)

punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.

The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there.⁴ But, by statute, some other offences are made piracy also : as by statute 11 and 12 Wm. III., ch. 7, if any natural born subject commits any act of hostility upon the high seas, against others of his majesty's subjects, under color of a commission from any foreign power ; this, though it would only be an act of war in an alien, shall be construed piracy in a subject. And farther, any commander, or other seafaring person, betraying his trust, and running away with any ship, boat, ordnance, ammunition, or goods ; or yielding them up voluntarily to a pirate ; or conspiring to do these acts ; or any person assaulting the commander of a vessel to hinder him from fighting in defence of his ship, or confining him, or making or endeavoring to make a revolt on board ; shall, for each of these offences, be adjudged a pirate, felon, and robber. By the statute 8 Geo. I., ch. 24, the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in any wise consulting, combining, confederating, or corresponding with them : or the forcibly boarding any merchant vessel, though without seizing or carrying her off, and destroying or throwing any of the goods overboard, shall be deemed piracy. Lastly, by statute 18 Geo. II., ch. 30, any natural born subject or denizen, who in time of war shall commit hostilities at sea against any of his fellow-subjects, or shall assist an enemy on that element, is liable to be tried and convicted as a pirate.

These are the principal cases, in which the statute law of England interposes to aid and enforce the law of nations, as a part of the common law : by inflicting an adequate punishment upon offences against that universal law, committed by private persons. We shall proceed in the next chapter to consider offences, which more immediately affect the sovereign executive power of our own particular state, or the king and government ;

⁴ Various acts of Congress have been passed, prescribing what classes of acts shall be deemed piracy. For details, reference should be made to the United States Revised Statutes.

which species of crime branches itself into a much larger extent than either of those of which we have already treated.

CHAPTER V.

[BL. COMM.—BOOK IV., CH. VI.]

Of High Treason.

THE third general division of crimes consists of such as more especially affect the supreme executive power, or the king and his government; which amount either to a total renunciation of that allegiance, or at the least to a criminal neglect of that duty, which is due from every subject to his sovereign. In the former part of these commentaries we had occasion to mention the nature of allegiance, as the tie or *ligamen* which binds every subject to be true and faithful to his sovereign *liege* lord the king, in return for that protection which is afforded him; and truth and faith to bear of life and limb, and earthly honor; and not to know or hear of any ill intended him, without defending him therefrom. And this allegiance, we may remember, was distinguished into two species: the one natural and perpetual, which is inherent only in natives of the king's dominions; the other local and temporary, which is incident to aliens also. Every offence therefore more immediately affecting the royal person, his crown, or dignity, is in some degree a breach of this duty of allegiance whether natural or innate, or local and acquired by residence.

Treason, *proditio*, in its very name (which is borrowed from the French) imports a betraying, treachery, or breach of faith. It therefore happens only between allies, saith the Mirror: for treason is indeed a general appellation, made use of by the law, to denote not only offences against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual relation: and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to

destroy the life of any such superior or lord. This is looked upon as proceeding from the same principle of treachery in private life, as would have urged him who harbors it to have conspired in public against his liege lord and sovereign, and therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary: these, being breaches of the lower allegiance, of private and domestic faith, are denominated *petit* treasons.¹ But when disloyalty so rears its crest, as to attack even majesty itself, it is called by way of eminent distinction *high* treason, *alta proditio*; being equivalent to the *crimen læsæ majestatis* of the Romans, as Glanvil denominates it also in our English law.

As this is the highest civil crime, which (considered as a member of the community) any man can possibly commit, it ought therefore to be the most precisely ascertained. For if the crime of high treason be indeterminate, this alone (says the president Montesquieu) is sufficient to make any government degenerate into arbitrary power. And yet, by the ancient common law, there was a great latitude left in the breast of the judges to determine what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise, by forced and arbitrary constructions, offences into the crime and punishment of treason which never were suspected to be such. Thus the *accroaching*, or attempting to exercise, royal power (a very uncertain charge) was in the 21 Edw. III., held to be treason in a knight of Hertfordshire, who forcibly assaulted and detained one of the king's subjects till he paid him £90: a crime, it must be owned, well deserving of punishment; but which seems to be of a complexion very different from that of treason. Killing the king's father, or brother, or even his messenger, has also fallen under the same denomination. The latter of which is almost as tyrannical a doctrine as that of the imperial constitution of Arcadius and Honorius, which determines that any attempts or designs against the ministers of the prince shall be treason. But, however, to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the statute 25 Edw. III., ch. 2, was made; which defines what offences only for the future

¹ The crime of *petit* treason has been abolished in England, and is nowhere recognized in the United States.

should be held to be treason: in like manner as the *lex Julia majestatis* among the Romans promulged by Augustus Cæsar, comprehended all the ancient laws, that had before been enacted to punish transgressors against the state. This statute must therefore be our text and guide, in order to examine into the several species of high treason. It comprehends all kinds of high treason under seven distinct branches. [But we shall treat only of those which are of chief importance.]

I. "When a man doth compass or imagine the death of our lord the king, of our lady his queen, or of their eldest son and heir." Under this description it is held that a queen regnant (such as queen Elizabeth and queen Anne) is within the words of the act, being invested with royal power, and entitled to the allegiance of her subjects: but the husband of such a queen is not comprised within these words, and therefore no treason can be committed against him. The king here intended is the king in possession, without any respect to his title: for it is held, that a king *de facto* and not *de jure*, or, in other words, an usurper that hath got possession of the throne, is a king within the meaning of the statute: as there is a temporary allegiance due to him, for his administration of the government, and temporary protection of the public: and therefore treasons committed against Henry VI. were punished under Edward IV., though all the line of Lancaster had been previously declared usurpers by act of parliament. But the most rightful heir of the crown, or king *de jure* and not *de facto*, who hath never had plenary possession of the throne, as was the case of the house of York during the three reigns of the line of Lancaster, is not a king within this statute, against whom treasons may be committed. And a very sensible writer on the crown law carries the point of possession so far, that he holds, that a king out of possession is so far from having any right to our allegiance, by any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him (*a*). A doctrine which he grounds upon the statute 11 Hen. VII., ch. 1, which is declaratory of the common law, and pronounces all subjects excused from any penalty or forfeiture, which do assist and obey a king *de facto*. But, in truth, this seems to be confounding all notions of right and wrong; and the consequence would be, that when Cromwell had murdered the elder Charles, and usurped

(a) 1 Hawkins, Pleas of the Crown, 36.

the power (though not the name) of king, the people were bound in duty to hinder the son's restoration: and were the king of Poland or Morocco to invade this kingdom, and by any means to get possession of the crown (a term, by the way, of very loose and indistinct signification), the subject would be bound by his allegiance to fight for his natural prince to-day, and by the same duty of allegiance to fight against him to-morrow. The true distinction seems to be, that the statute of Henry the Seventh does by no means *command* any opposition to a king *de jure*; but *excuses* the obedience paid to a king *de facto*. When therefore an usurper is in possession, the subject is *excused* and *justified* in obeying and giving his assistance: otherwise, under an usurpation, no man could be safe: if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience. Nay, further, as the mass of people are imperfect judges of title, of which in all cases possession is *prima facie* evidence, the law compels no man to yield obedience to that prince, whose right is by want of possession rendered uncertain and disputable, till Providence shall think fit to interpose in his favor, and decide the ambiguous claim: and therefore, till he is entitled to such allegiance by possession, no treason can be committed against him. Lastly, a king who has resigned his crown, such resignation being admitted and ratified in parliament, is according to Sir Matthew Hale no longer the object of treason. And the same reason holds, in case a king abdicates the government; or, by actions subversive of the constitution, virtually renounces the authority which he claims by that very constitution: since, as was formerly observed, when the fact of abdication is once established, and determined by the proper judges, the consequence necessarily follows, that the throne is thereby vacant, and he is no longer king.

Let us next see, what is a *compassing* or *imagining* the death of the king, &c. These are synonymous terms; the word *compass* signifying the purpose or design of the mind or will, and not, as in common speech, the carrying such design to effect. And therefore an accidental stroke, which may mortally wound the sovereign, *per infortunium*, without any traitorous intent, is no treason: as was the case of Sir Walter Tyrrel, who, by the command of King William Rufus, shooting at a hart, the arrow glanced against a tree, and killed the king on the spot. But, as

this compassing or imagining is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some open, or *overt* act. And yet the tyrant Dionysius is recorded to have executed a subject, barely for dreaming that he had killed him ; which was held of sufficient proof, that he had thought thereof in his waking hours. But such is not the temper of the English law ; and therefore in this, and the three next species of treason, it is necessary that there appear an open or *overt* act of a more full and explicit nature, to convict the traitor upon. The statute expressly requires, that the accused “be thereof upon sufficient proof attainted of some open act by men of his own condition.” Thus, to provide weapons or ammunition for the purpose of killing the king, is held to be a palpable overt act of treason in imagining his death. To conspire to imprison the king by force, and move towards it by assembling company, is an overt act of compassing the king’s death ; for all force, used to the person of the king, in its consequence may tend to his death, and is a strong presumption of something worse intended than the present force, by such as have so far thrown off their bounden duty to their sovereign ; it being an old observation, that there is generally but a short interval between the prisons and the graves of princes. There is no question also, but that taking any measures to render such treasonable purposes effectual, as assembling and consulting on the means to kill the king, is a sufficient overt act of high treason.

How far mere *words*, spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to treason, has been formerly matter of doubt. We have two instances in the reign of Edward the Fourth, of persons executed for treasonable words ; the one a citizen of London ; who said he would make his son heir of the *crown*, being the sign of the house in which he lived ; the other a gentleman, whose favorite buck the king killed in hunting, whereupon he wished it, horns and all, in the king’s belly. These were esteemed hard cases : and the chief justice Markham rather chose to leave his place than assent to the latter judgment. But now it seems clearly to be agreed, that by the common law and the statute of Edward III. words spoken amount to only a high misdemeanor, and no treason. For they may be spoken in heat, without any intention, or be mistaken, perverted, or mis-remembered by the

hearers ; their meaning depends always on their connection with other words and things ; they may signify differently even according to the tone of voice with which they are delivered ; and sometimes silence itself is more expressive than any discourse. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to high treason. And accordingly in 4 Car. I. on a reference to all the judges, concerning some very atrocious words spoken by one Pyne, they certified to the king, "that though the words were as wicked as might be, yet they were no treason : for unless it be by some particular statute, no words will be treason." If the words be set down in writing, it argues more deliberate intention : and it has been held that writing is an overt act of treason ; for *scribere est agere*. But even in this case the bare words are not the treason, but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns convicted its author of treason : particularly in the cases of one Peachum, a clergyman, for treasonable passages in a sermon never preached ; and of Algernon Sydney, for some papers found in his closet ; which, had they been plainly relative to any previous formed design of dethroning or murdering the king, might doubtless have been properly read in evidence as overt acts of that treason, which was specially laid in the indictment. But being merely speculative, without any intention (so far as appeared) of making any public use of them, the convicting the authors of treason upon such an insufficient foundation has been universally disapproved. Peachum was therefore pardoned : and though Sydney indeed was executed, yet it was to the general discontent of the nation ; and his attainder was afterwards reversed by parliament. There was then no manner of doubt, but that the publication of such a treasonable writing was a sufficient overt act of treason at the common law ; though of late even that has been questioned.

2. The second species of treason is, "if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir." By the king's companion is meant his wife ; and by violation is understood carnal knowledge, as well without force, as with it : and this is high treason in both parties, if both be consenting ; as some of the wives of Henry the Eighth by fatal experience evinced. The

plain intention of this law is to guard the blood royal from any suspicion of bastardy, whereby the succession to the crown might be rendered dubious: and therefore, when this reason ceases, the law ceases with it; for to violate a queen or princess-dowager is held to be no treason; in like manner as, by the feudal law, it was a felony and attended with a forfeiture of the fief, if the vassal vitiated the wife or daughter of his lord, but not so if he only vitiated his widow.

3. The third species of treason is, "if a man do levy war against our lord the king in his realm." And this may be done by taking arms, not only to dethrone the king, but under pretence to reform religion, or the laws, or to remove evil counsellors, or other grievances whether real or pretended. For the law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power, for these purposes, in the high court of parliament: neither does the constitution justify any private or particular resistance for private or particular grievances; though in cases of national oppression the nation has very justifiably risen as one man to vindicate the original contract subsisting between the king and his people. To resist the king's forces by defending a castle against them, is a levying of war: and so is an insurrection with an avowed design to pull down *all* inclosures, *all* brothels, and the like; the universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the king's authority. But a tumult, with a view to pull down a particular house, or lay open a particular inclosure, amounts at most to a riot; this being no general defiance of public government. So, if two subjects quarrel and levy war against each other (in that spirit of private war, which prevailed all over Europe in the early feudal times), it is only a great riot and contempt, and no treason. Thus it happened between the Earls of Hereford and Gloucester in 20 Edward I. who raised each a little army, and committed outrages upon each other's lands, burning houses, attended with the loss of many lives: yet this was held to be no high treason, but only a great misdemeanor. A bare conspiracy to levy war does not amount to this species of treason; but (if particularly pointed at the person of the king or his government) it falls within the first, of compassing or imagining the king's death.

4. "If a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere," he is also declared guilty of high treason.² This must likewise be proved by some overt act, as by giving them intelligence, by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the like. By enemies are here under-

² In this country, treason may be committed either against the United States, or against a particular State. The United States Constitution defines the offense as follows: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." (Art. 3, § 3.) The only forms of treason, therefore, which are recognized, correspond to the third and fourth species mentioned in the text. The phraseology of this constitutional provision was adopted from the English law, and the expressions used have received substantially the same interpretation. To "levy war" is to raise, make, create, or carry on war. It is not necessary that there should be an actual prosecution of hostilities; but if there be a body of men actually assembled for the purpose of effecting a treasonable purpose by force, this is a sufficient levying of war. A mere conspiracy to subvert the government will not be sufficient; but there must be a combination or gathering of men, who design to effect some object of a public and general nature, by a resort to the use of force against the public authorities or troops, and who present a forcible or warlike appearance. It is not necessary that they should be supplied with arms; it is sufficient that there be an assemblage in force,—a military assemblage in a condition to make war. But if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting, by force, a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. (*Ex parte Bollman*, 4 Cranch, 75; *U. S. v. Burr*, 4 Cranch, 481; *U. S. v. Hanway*, 2 Wallace, jr. 144.)

"What amounts to adhering to, and giving aid and comfort to our enemies, it is somewhat difficult in all cases to define; but certain it is, that furnishing them with arms, or munitions of war, vessels, or other means of transportation, or any materials which will aid the traitors in carrying out their traitorous purposes with a knowledge that they are intended for such purposes; or inciting and encouraging others to engage in, or aid the traitors in any way, does come within the provisions of the act. And it is immaterial whether such acts are induced by sympathy with the rebellion, hostility to the government, or a desire for gain." (Per *Smalley*, J., 23 Law Reporter, 597, 601.) But rendering aid to domestic rebels does not come within the scope of this provision.

The constitutional and statutory provisions in the several States, defining the offense of treason against such States respectively, are generally identical in terms with the provisions in the United States Constitution.

stood the subjects of foreign powers with whom we are at open war. As to foreign pirates or robbers, who may happen to invade our coasts, without any open hostilities between their nation and our own, and without any commission from any prince or state at enmity with the crown of Great Britain, the giving them any assistance is also clearly treason ; either in the light of adhering to the public enemies of the king and kingdom, or else in that of levying war against His Majesty. And, most indisputably, the same acts of adherence or aid, which (when applied to foreign enemies) will constitute treason under this branch of the statute, will (when afforded to our own fellow-subjects in actual rebellion at home) amount to high treason under the description of levying war against the king. But to relieve a rebel, fled out of the kingdom, is no treason : for the statute is taken strictly, and a rebel is not an *enemy* : an enemy being always the subject of some foreign prince, and one who owes no allegiance to the crown of England. And if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with either rebels or enemies in the kingdom, provided he leaves them whenever he hath a safe opportunity.

Thus much for the crime of treason, or *læsæ majestatis*, which consists, we may observe, originally, in grossly counteracting that allegiance which is due from the subject by either birth or residence ; though, in some instances, the zeal of our legislators to stop the progress of some highly pernicious practices has occasioned them a little to depart from this its primitive idea. But of this enough has been hinted already : it is now time to pass on from defining the crime to describing its punishment.

The punishment of high treason in general is very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk : though usually (by connivance at length ripened by humanity into law) a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement. 2. That he be hanged by the neck, and then cut down alive. 3. That his entrails be taken out and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal.

The king may and often doth, discharge all the punishment,

except beheading, especially where any of noble blood are attainted. For beheading, being part of the judgment, that may be executed, though all the rest be omitted by the king's command. But where beheading is no part of the judgment, as in murder or other felonies, it hath been said that the king cannot change the judgment, although at the request of the party, from one species of death to another. But of this we shall say more hereafter.

But in treasons of every kind the punishment of woman is the same, and different from that of men. For as the decency due to the sex forbids the exposing and publicly mangling their bodies, their sentence (which is to the full as terrible to sensation as the other) is to be drawn to the gallows, and there to be burned alive.⁸

The consequence of this judgment (attainder, forfeiture, and corruption of blood) must be referred to the latter end of this book, when we shall treat of them all together, as well in treason as in other offences.

CHAPTER VI.

[BL. COMM.—BOOK IV. CH. VII.]

Of Felonies.

FELONY in the general acceptation of our English law, comprises every species of crime, which occasioned at common law the forfeiture of lands and goods.¹ This most frequently happens in those crimes, for which a capital punishment either is or

⁸ Treason is still punishable in England with the death penalty; but the barbarous methods of inflicting this punishment, mentioned in the text, have been abolished. The offender is now to be hanged by the neck till dead and the penalty is the same for women as for men.

In the United States, an act of Congress, passed in 1790, prescribed the penalty of death for treason. And, by act of July 17, 1862, the penalty of fine and imprisonment, together with the liberation of slaves belonging to the person convicted, was prescribed as a mode of punishment,—which, in the discretion of the court, might be imposed instead of the death penalty.

¹ As to the signification of "felony," in American law, see *ante*, page, 846, note 2.

was liable to be inflicted: for those felonies which are called *clergyable*, or to which the benefit of clergy extends, were anciently punished with death, in all lay, or unlearned offenders; though now by the statute-law that punishment is for the first offence universally remitted. Treason itself, says Sir Edward Coke, was anciently comprised under the name felony: and in confirmation of this we may observe that the statute of treasons, 25 Edw. III. ch. 2, speaking of some dubious crimes, directs a reference to parliament; that it may there be adjudged, "whether they be treason or *other felony*." All treasons therefore, strictly speaking, are felonies; though all felonies are not treason. And to this also we may add, that not only all offences, now capital, are in some degree or other felony; but that this is likewise the case with some other offences, which are not punished with death; as suicide, where the party is already dead; homicide by chance-medley, or in self-defence; and petit larceny or pilfering: all which are (strictly speaking) felonies, as they subject the committers of them to forfeitures. So that upon the whole the only adequate definition of felony seems to be that which is before laid down; *viz.*, an offence which occasions a total forfeiture of either lands, or goods, or both, at the common law, and to which capital or other punishment may be superadded, according to the degree of guilt.

To explain this matter a little farther: the word *felony* or *felonia*, is of undoubted feudal original, being frequently to be met with in the books of feuds, &c.; but the derivation of it has much puzzled the juridical lexicographers, Prateus, Calvinus, and the rest: some deriving it from the Greek *φηλος*, an impostor or deceiver; others from the Latin *fallo*, *fefelli*, to countenance which they would have it called *fallonia*. Sir Edward Coke, as his manner is, has given us a still stranger etymology; that it is *crimen animo felleo perpetratum*, with a bitter or gallish inclination. But all of them agree in the description, that it is such a crime as occasions a forfeiture of all the offender's lands or goods. And this gives great probability to Sir Henry Spelman's Teutonic or German derivation of it: in which language indeed, as the word is clearly of feudal original, we ought rather to look for its signification, than among the Greeks and Romans. *Fe-lon* then, according to him, is derived from two northern words: *fee*, which signifies (we well know) the fief, feud, or beneficiary estate: and

lon, which signifies price or value. Felony is therefore the same as *pretium feudi*, the consideration for which a man gives up his fief; as we say in common speech, such an act is as much as your life or estate is worth. In this sense it will clearly signify the feudal forfeiture, or act by which an estate is forfeited or escheats to the lord.

To confirm this we may observe, that it is in this sense, of forfeiture to the lord, that the feudal writers constantly use it. For all those acts, whether of a criminal nature or not, which at this day are generally forfeitures of copyhold estates are styled *felonia* in the feudal law. So likewise injuries of a more substantial or criminal nature were denominated felonies, that is, forfeitures: as assaulting or beating the lord; vitiating his wife or daughter; all these are esteemed felonies, and the latter is expressly so denominated. And as these contempts, or smaller offences, were felonies, or acts of forfeiture, of course greater crimes, as murder and robbery, fell under the same denomination. On the other hand, the lord might be guilty of felony, or forfeit his seignory to the vassal, by the same acts as the vassal would have forfeited his feud to the lord. One instance given of this sort of felony in the lord is beating the servant of his vassal, so as that he loses his services; which seems merely in the nature of a civil injury, so far as it respects the vassal. And all these felonies were to be determined "*per laudamentum sive iudicium parium suorum*" in the lord's court; as with us forfeitures of copyhold lands are presentable by the homage in the court-baron.

Felony, and the act of forfeiture to the lord, being thus synonymous terms in the feudal law, we may easily trace the reason why, upon the introduction of that law into England, those crimes which induced such forfeiture or escheat of lands (and, by small deflection from the original sense, such as induced the forfeiture of goods also) were denominated felonies. Thus it was said, that suicide, robbery, and rape, were felonies; that is, the consequence of such crimes was forfeiture; till by long use we began to signify by the term of felony the actual crime committed, and not the penal consequence. And upon this system only can we account for the cause, why treason in ancient times was held to be a species of felony: *viz.*, because it induced a forfeiture.

Hence it follows, that capital punishment does by no means enter into the true idea and definition of felony. Felony may be

without inflicting capital punishment, as in the cases instance^d of self-murder, excusable homicide, and petit larceny : and it is possible that capital punishments may be inflicted, and yet the offence be no felony ; as in case of heresy by the common law, which, though capital, never worked any forfeiture of lands or goods, an inseparable incident to felony. And of the same nature was the punishment of standing mute, without pleading to an indictment, which at the common law was capital, but without any forfeiture, and therefore such standing mute was no felony. In short, the true criterion of felony is forfeiture ; for, as Sir Edward Coke justly observes, in all felonies which are punishable with death, the offender loses all his lands in fee-simple, and also his goods and chattels ; in such as are not so punishable, his goods and chattels only.

The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them ; and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offence felony, the law implies that it shall be punished with death, *viz.*, by hanging as well as with forfeiture : unless the offender prays the benefit of clergy ; which all felons are entitled once to have, provided the same is not expressly taken away by statute. And in compliance herewith, I shall for the future consider it also in the same light, as a generical term, including all capital crimes below treason ; having premised thus much concerning the true nature and original meaning of felony, in order to account for the reason of those instances I have mentioned, of felonies that are not capital, and capital offences that are not felonies : which seem at first view repugnant to the general idea which we now entertain of felony, as a crime to be punished by death : whereas properly it is a crime to be punished by forfeiture, and to which death may, or may not be, though it generally is, superadded.

CHAPTER VII.

[BL. COMM.—BOOK IV. CH. IX.]

Of Misprisions and Contempts Affecting the King and Government.

THE fourth species of offences more immediately against the king and government, are entitled misprisions and contempts.

Misprisions (a term derived from the old French, *mespris*, a neglect or contempt) are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon : and it is said, that a misprision is contained in every treason and felony whatsoever : and that if the king so please, the offender may be proceeded against for the misprision only. And upon the same principle, while the jurisdiction of the Star Chamber subsisted, it was held that the king might remit a prosecution for treason, and cause the delinquent to be censured in that court, merely for a high misdemeanor : as happened in the case of Roger, Earl of Rutland, in 43 Eliz., who was concerned in the Earl of Essex's rebellion. Misprisions are generally divided into two sorts : negative, which consist in the concealment of something which ought to be revealed ; and positive, which consist in the commission of something which ought not to be done.

I. Of the first, or negative kind, is what is called *misprision of treason* ; consisting in the bare knowledge and concealment of treason, without any degree of assent thereto : for any assent makes the party a principal traitor ; as indeed the concealment, which was construed aiding and abetting, did at the common law : in like manner as the knowledge of a plot against the state, and not revealing it, was a capital crime at Florence and other states of Italy. But it is now enacted by the statute 1 & 2 Ph. & M., ch. 10, that a bare concealment of treason shall be only held a misprision. This concealment becomes criminal, if the party apprised of the treason does not, as soon as conveniently may be, reveal it to some judge of assize or justice of the peace. But if there be any probable circumstances of assent, as if one goes to a treasonable meeting, knowing beforehand that a con-

spiracy is intended against the king ; or, being in such company once by accident, and having heard such treasonable conspiracy, meets the same company again, and hears more of it, but conceals it ; this is an implied assent in law, and makes the concealer guilty of actual high treason.¹

Misprision of felony is also the concealment of a felony which a man knows, but never assented to ; for if he assented, this makes him either principal or accessory. And the punishment of this, in a public officer, by the statute Westm. 1, 3 Edw. I., ch. 9, is imprisonment for a year and a day ; in a common person, imprisonment for a less discretionary time ; and, in both, fine and ransom at the king's pleasure ; which pleasure of the king must be observed, once for all, not to signify any extrajudicial will of the sovereign, but such as is declared by his representatives, the judges in his courts of justice: "*voluntas regis in curia, non in camera.*"

There is also another species of negative misprisions ; namely, the *concealing of treasure-trove*, which belongs to the king or his grantees by prerogative royal : the concealment of which was formerly punishable by death ; but now only by fine and imprisonment.

II. Misprisions, which are merely positive, are generally denominated *contempts* or *high misdemeanors* ;² of which

1. The first and principal is the *mal-administration* of such high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment ;³

¹ An act of Congress declares it to be misprision of treason, if any person having knowledge of the commission of any treason against the United States, "shall conceal, and not, as soon as may be, disclose and make known the same to the President of the United States, or some one of the judges thereof, or to the President or Governor of a particular State, or some one of the judges or justices thereof." (U. S. Rev. St. § 5333.)

² The term "misprision," is most commonly used in criminal law, in its negative sense, denoting the concealment of treason or felony. Such crimes as are denominated "positive misprisions" by Blackstone, would generally be considered and treated as substantive offenses.

³ It is provided, by the United States Constitution, that the President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. (Art. 2, § 4.) Impeachments are tried by the Senate, upon presentation by the House of Representatives. When the President is impeached, the Chief-Justice of the Supreme Court presides

wherein such penalties, short of death, are inflicted, as to the wisdom of the peers shall seem proper; consisting usually of banishment, imprisonment, fines, or perpetual disability. Other misprisions are, in general, such contempts of the executive magistrate, as demonstrate themselves by some arrogant and undutiful behavior towards the king and government. These are

2. Contempts against the king's *prerogative*. As, by refusing to assist him for the good of the public: either in his councils, by advice, if called upon; or in his wars, by personal service for defence of the realm, against a rebellion or invasion. Under which class may be ranked the neglecting to join the *posse comitatus*, or power of the county, being thereunto required by the sheriff or justices. Or, by disobeying the king's lawful commands; whether by writs issuing out of his courts of justice, or by summons to attend his privy council, or by letters from the king to a subject, commanding him to return from beyond seas (for disobedience to which his lands shall be seized till he does return, and himself afterwards punished), or by his writ of *ne exeat regnum*, or proclamation, commanding the subject to stay at home. Disobedience to any of these commands is a high misprision and contempt; and so, lastly, is disobedience to any act of parliament, where no particular penalty is assigned; for then it is punishable, like the rest of these contempts, by fine and imprisonment, at the discretion of the king's courts of justice.

3. Contempts against the king's *palaces* or *courts of justice*, have been always looked upon as high misprisions.

But *striking* in the king's superior courts of justice, in Westminster-hall, or at the assizes, is made still more penal than even in the king's palace. The reason seems to be, that those courts being anciently held in the king's palace, and before the king himself, striking there included the former contempt against the king's palace, and something more; *viz.*, the disturbance of public justice. Therefore a stroke or blow in such a court of

over the Senate. The concurrence of two-thirds of the members present is necessary to conviction. Judgment extends no further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted is liable to indictment according to law.

In the various States, provision is made for the trial of impeachments of State officers before the Senate, or highest legislative body of the State.

justice, whether blood be drawn or not, or even assaulting a judge sitting in the court, by drawing a weapon, without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of his lands during life. A *rescue* also of a prisoner from any of the said courts, without striking a blow, is punished with perpetual imprisonment, and forfeiture of goods, and of the profits of lands during life; being looked upon as an offence of the same nature with the last; but only, as no blow is actually given, the amputation of the hand is excused. For the like reason, an affray, or riot, near the said courts, but out of their actual view, is punished only with fine and imprisonment.

Not only such as are guilty of an actual violence, but of threatening or reproachful words to any judge sitting in the courts, are guilty of a high misprision, and have been punished with large fines, imprisonment, and corporal punishment. And, even in the inferior courts of the king, an affray or contemptuous behavior is punishable with a fine by the judges there sitting.

Likewise all such as are guilty of any injurious treatment to those who are immediately under the protection of a court of justice, are punishable by fine and imprisonment: as if a man assaults or threatens his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a jailer or other ministerial officer for keeping him in custody, and properly executing his duty.

Lastly, to endeavor to dissuade a witness from giving evidence; to disclose an examination before the privy council (all of which are impediments of justice); are high misprisions, and contempts of the king's courts, and punishable by fine and imprisonment. And anciently it was held, that if one of the grand jury disclosed to any person indicted, the evidence that appeared against him, he was thereby made accessory to the offence, if felony; and in treason a principal. And at this day it is agreed, that he is guilty of a high misprision, and liable to be fined and imprisoned.⁴

⁴ The penalties for these various offences have been much reduced in severity by subsequent English legislation. These various classes of acts, interfering with the regular and orderly administration of justice, are generally declared punishable in this country as contempts of court, or as misdemeanors.

CHAPTER VIII.

[BL. COMM.—BOOK IV. CH. X.]

Of Offences against Public Justice.

THE crimes and misdemeanors that more especially affect the commonwealth, may be divided into four species: *viz.*, offences against public *justice*, against the public *peace*, against public *trade*, and against the public *police* or *economy*; of each of which we will take a cursory view in their order.

First, then, of offences against public *justice*: some of which are felonious, whose punishment may extend to death; others only misdemeanors. I shall begin with those that are most penal, and descend gradually to such as are of less malignity.

1. One offence against public justice is *obstructing* the execution of lawful *process*. This is at all times an offence of a very high and presumptuous nature; but more particularly so, when it is an obstruction of an arrest upon criminal process. And it hath been holden, that the party opposing such arrest becomes thereby *particeps criminis*; that is, an accessory in felony, and a principal in high treason. Formerly one of the greatest obstructions to public justice, both of the civil and criminal kind, was the multitude of pretended privileged places, where indigent persons assembled together to shelter themselves from justice (especially in London and Southwark), under the pretext of their having been ancient palaces of the crown, or the like: all of which sanctuaries for iniquity are now demolished, and the opposing of any process therein is made highly penal, by statute.¹

¹ It is now provided by statute 24 & 25 Vict., ch. 100, that whosoever 'shall assault, resist or wilfully obstruct any peace officer in the due execution of his duty, or any person acting in aid of such officer, or shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself, or of any other person for any offence,' shall be guilty of a misdemeanor. Statutes of similar character are in force in the several States of this country.

It is an additional rule of the common law, that the wilful refusal to aid a peace officer in the execution of his duty, in order to preserve the peace, is an indictable misdemeanor.

2. An *escape* of a person arrested upon criminal process by eluding the vigilance of his keepers before he is put in hold, is also an offence against public justice, and the party himself is punishable by fine or imprisonment. But the officer permitting such escape, either by negligence or connivance, is much more culpable than the prisoner; the natural desire of liberty pleading strongly in his behalf, though he ought in strictness of law to submit himself quietly to custody, till cleared by the due course of justice. Officers therefore who, after arrest, *negligently* permit a felon to escape, are also punishable by fine: but *voluntary* escapes, by consent and connivance of the officer, are a much more serious offence: for it is generally agreed that such escapes amount to the same kind of offence, and are punishable in the same degree as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass. And this whether he were actually committed to jail, or only under a bare arrest. But the officer cannot be thus punished, till the original delinquent hath actually received judgment or been attainted upon verdict, confession, or outlawry, of the crime for which he was so committed or arrested: otherwise it might happen, that the officer might be punished for treason or felony, and the person arrested and escaping might turn out to be an innocent man. But, before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemeanor.²

3. Breach of prison by the offender himself, when committed for any cause, was felony at the common law: or even conspiring to break it. But this severity is mitigated by the statute *de frangentibus prisonam*, 1 Edw. II., st. 2, which enacts, that no person shall have judgment of life or member for breaking prison unless committed for some capital offence.³ So that to break prison and escape, when lawfully committed for any treason or felony, remains still felony as at the common law; and to break prison

² There are specific statutes, in many of the States, prescribing the punishment for this offence of escape. The following cases may be consulted: *People v. Duell*, 3 Johns. 449; *People v. Rose*, 12 Johns. 339; *People v. Tompkins*, 9 Johns. 70; *Comm. v. Farrell*, 5 Allen, 130.

³ This statute is deemed to be part of the common law in the United States, unless superseded by other legislation upon this subject. But special statutes are in force, in many of the States, in relation to this offence.

(whether it be the county-jail, the stocks, or other usual place of security), when lawfully confined upon any other inferior charge, is still punishable as a high misdemeanor by fine and imprisonment. For the statute which ordains that such offence shall be no longer capital, never meant to exempt it entirely from every degree of punishment.

4. Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment, and it is generally the same offence in the stranger so rescuing, as it would have been in a jailer to have *voluntarily* permitted an escape. A rescue therefore of one apprehended for felony, is felony; for treason, treason; and for a misdemeanor, a misdemeanor also. But here likewise as upon voluntary escapes, the principal must first be attainted or receive judgment before the rescuer can be punished: and for the same reason; because, perhaps in fact, it may turn out that there has been no offence committed. By the statute 16 Geo. II., ch. 31, to convey to any prisoner in custody for treason or felony any arms, instruments of escape, or disguise, without the knowledge of the jailer, though no escape be attempted, or any way to assist such prisoner to attempt an escape, though no escape be actually made, is felony: or if the prisoner be in custody for petit larceny or other inferior offence, it is then a misdemeanor. And by several special statutes, to rescue, or attempt to rescue, any person committed for the offences enumerated in those acts, is felony without benefit of clergy; and to rescue, or attempt to rescue, the body of a felon executed for murder, is single felony, and subject to transportation for seven years.⁴

5. Receiving of stolen goods, *knowing them to be stolen*, is also a high misdemeanor and affront to public justice. We have seen in a former chapter, that this offence, which is only a misdemeanor at common law, by the statute 3 & 4 W. & M., ch. 9, and 5 Ann., ch. 31, makes the offender accessory to the theft and felony.⁵

⁴ These various statutes have been superseded by later enactments, which, however, embody substantially the same provisions, though the penalties have been made less severe. Similar statutes are found in various States of this country.

⁵ This crime has now been made a substantive offence, in English law; and it is provided that the receiving of any chattel, money, valuable security or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof amounts to felony, with knowledge

6. Of a nature somewhat similar to the last is the offence of *theft bote*, which is where the party robbed not only knows the felon, but also takes his goods again, or other amends upon agreement not to prosecute. This is frequently called compounding of felony; and formerly was held to make a man an accessory; but it is now punished only with fine and imprisonment. By statute 25 Geo. II., ch. 36, even to advertise a reward for the return of things stolen, with no questions asked, or words to the same purport, subjects the advertiser and the printer to a forfeiture of £50 each.^a

7. Common *barretry* is the offence of frequently exciting and stirring up suits and quarrels between His Majesty's subjects, either at law or other-ways. The punishment for this offence, in a common person, is by fine and imprisonment; but if the offender (as is too frequently the case) belongs to the profession of the law, a barretor, who is thus able as well as willing to do mischief, ought also to be disabled from practising for the future. And indeed it is enacted by statute 12 Geo. I., ch. 29, that if any one, who hath been convicted of forgery, perjury, subornation of perjury, or common barretry, shall practise as an attorney, solicitor, or agent, in any suit; the court, upon complaint, shall ex-

that the same was feloniously stolen or obtained, is felony; and that the receiving with such guilty knowledge of any property, the stealing or obtaining whereof is a misdemeanor, is itself a misdemeanor. (24 & 25 Vict., ch. 96.) Statutes of similar scope and purport have been generally enacted in the United States.

To sustain a conviction for this offence, it is not necessary to prove that the receiver acted from motives of personal gain, or that any consideration passed to him from the thief. (117 Mass. 141; 69 N. Car. 29; 12 Wend. 76.) Proof of the actual receipt of the goods, and of guilty knowledge, is all that is required. The receiver may be convicted, though he has offered to restore the goods to the owner, upon payment of a reward. (*People v. Wiley*, 3 Hill, 194.) In order to prove guilty knowledge, evidence is admissible that the prisoner had frequently received similar articles of property, under like circumstances, from the same thief, stolen from the same person and place, knowing that they were stolen. (*Copperman v. People*, 56 N. Y. 591.)

^a This statute has been superseded by a later enactment (24 & 25 Vict. ch. 96), which contains provisions of a similar character. The compounding of felonies is declared to be a criminal offense by the legislatures of many of the States; and, in some States, this is true also of the compounding of misdemeanors. It is a general rule, that a contract made in compounding an offense is not enforceable. (See *Comm. v. Pease*, 16 Mass. 91; *Hinesburg v. Sumner*, 9 Vt. 23.)

mine it in a summary way ; and, if proved, shall direct the offender to be transported for seven years. Hereunto may also be referred another offence, of equal malignity and audaciousness ; that of suing another in the name of a fictitious plaintiff ; either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king's superior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by statute 8 Eliz., ch. 2, to be punished by six months' imprisonment, and treble damages to the party injured.⁷

8. Maintenance is an offence that bears a near relation to the former ; being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it : a practice that was greatly encouraged by the first introduction of uses. This is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law, into an engine of oppression. And therefore, by the Roman law, it was a species of the *crimen falsi* to enter into any confederacy, or do any act to support another's lawsuit, by money, witnesses or patronage. A man may however maintain the suit of his near kinsman, servant, or poor neighbor, out of charity and compassion, with impunity.

9. Champerty, *campi-partitio*, is a species of maintenance, and punished in the same manner : being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law ; whereupon the champertor is to carry on the party's suit at his own expense.⁸ Thus *champart*, in the French law, signifies a similar

⁷ The statute 12 Geo. I., ch. 29 has been made perpetual by statute 30 & 31 Vict., ch. 59, but the punishment has been changed. There are few modern decisions in regard to the offense of barrettry. The purchase, in a single instance, of a claim, with a view to its litigation, does not amount to barrettry ; there must be a common practice of fomenting suits and proceedings at law. (See *Voorhees v. Dorr*, 51 Barb. 580.) This subject is usually regulated by statute.

⁸ Maintenance and champerty are offenses closely resembling each other, the chief difference being that the latter involves an agreement or stipulation for profit to be derived from the proceeds of the litigation, while in the for-

division of profits, being a part of the crop annually due to the landlord by bargain or custom. In our sense of the word it signifies the purchasing of a suit, or right of suing: a practice so much abhorred by our law, that it is one main reason why a *chose* in action, or thing of which one hath the right but not the

mer there is no such element of gain. Such acts were deemed highly pernicious in the early law, as tending to promote unnecessary strife and contention, and to encourage a litigious spirit. But, in criminal law, these offenses are at present of comparatively little importance, since prosecutions for them are rarely instituted. There are, however, statutes in force in several States of this country, declaring such acts to be misdemeanors, and therefore indictable; and in some States the rules of the common law still constitute the law upon these subjects. But these topics are of most importance in civil law, since contracts founded in champerty or maintenance are held to be void. Thus the purchase of a mere right of action by one who has no interest in the controversy with the express object of bringing suit thereon, for the purpose of harassing the defendant or of speculating out of the litigation, has been held illegal under laws forbidding maintenance. (2 Paige, 289; see 11 Q. B. D. 1; 117 U. S. 582; 14 N. Y. 289; 131 Mass. 436.) But if a person has any interest in the thing in dispute, though on contingency only, he may lawfully maintain an action upon it. Thus, it is not maintenance for a vendor with warranty to uphold his vendee in a suit about the title. (*Goodspeed v. Fuller*, 46 Me. 141; *Wickham v. Conklin*, 8 Johns. 220.) So kinsmen may assist one another in lawsuits; and one may lawfully advance money to a poor man to enable him to carry on a litigation, if it be done *bona fide* and not to promote useless suits. (17 Q. B. D. 104; 3 Johns. Ch. 508.) One of the most important instances of champerty is where an attorney makes an agreement with his client to carry on the suit at his own expense, and to take his compensation from the proceeds of the litigation, if the suit be carried to a successful issue. Such contracts are usually held to be void; though in some States lawyers are now permitted to contract for contingent fees payable from the proceeds of the suit. (102 N. Y. 395; 71 Ia. 197; 138 Mass. 530; 119 Ill. 626; 40 Kan. 195.) So the purchase by attorneys of rights of action, with the purpose of bringing suit thereon, is commonly prohibited in law, on grounds of public policy. Thus, in New York, it is provided by statute that no attorney shall buy any cause of action with intent to sue thereon; and that, if he is guilty of such an act, he shall be punishable for misdemeanor, and may be removed from office as attorney. (Code Civ. Pro. §§ 73-77.) The sale of pretended titles to land is also generally prohibited. By this is meant the sale of land which is in the possession of a person claiming under a title adverse to the grantor. Such conveyances are void, and the act is usually punishable as a misdemeanor; the same is true if land which is the subject of a pending suit is purchased by one knowing of such suit. (Washburn on Real Prop. III. 351, 5th ed.; *Pearce v. Moore*, 114 N. Y. 256; see 75 Ala. 225.) In some States the law of maintenance and champerty has been abolished (40 N. J. L. 195; 148 Mass. 18), or much limited in its scope. (102 N. Y. 395; cf. 144 Mass. 393; 93 U. S. 548.)

possession, is not assignable at common law ; because no man should purchase any pretence to sue in another's right. These pests of civil society, that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law. Hitherto also must be referred the provision of the statute 32 Hen. VIII., ch. 9 that no one shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year before such grant, or hath been in actual possession of the land, or of the reversion or remainder ; on pain that both purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor.

10. A conspiracy also to indict an innocent man of felony falsely and maliciously, who is accordingly indicted and acquitted, is a farther abuse and perversion of public justice ;⁹ for

⁹ The crime of conspiracy is an offense of greater comprehensiveness in scope, and of greater importance, than the brief statements in the text would indicate. It includes a variety of acts to which no reference is made. It is defined as a "combination or confederacy of two or more persons to accomplish some unlawful purpose, or a lawful purpose by some unlawful means." As this definition indicates, an act may be entirely lawful when performed by a single person, or, if not lawful, at least not criminal, which, if committed by two or more, would be indictable. For "the general principle on which the crime of conspiracy is founded is this, that the confederacy of several persons to effect any injurious object, creates such a new and additional power to cause injury as requires criminal restraint ; although none were necessary, were the same thing proposed, or even attempted to be done, by any person singly." (See Bishop's Cr. Law, ii. § 180.) But the act, though lawful, must be such as is particularly adapted to injure the public, or some individual, by reason of the combination. Thus, though each person at a theatre has a right to express his disapprobation of the piece acted, or of a performer on the stage, yet if several previously agree to condemn a play or hiss an actor, they will be guilty of conspiring. (*Clifford v. Brandon*, 2 Campbell, 358.) So the slander of an individual by a single person is not indictable ; but if several unite in a scheme to ruin his reputation by defamatory charges, it is a criminal conspiracy. The offense of conspiracy is complete, when its combination is proved, and no overt act in pursuance of the common intent is necessary to be proved. But this common law rule has been changed by statute in some States, proof of an overt act being required. Thus, in New York, it is provided that no agreement, except to commit a felony against the person, or arson, or burglary, shall be deemed a conspiracy, unless some act be done to effect the object thereof. (Penal Code, § 171 ; see 47 N. J. L. 180.) A corrupt or criminal intent is also essential to a criminal conspiracy. (63 N. Y. 88 ; 47 N. J. L. 461.)

which the party injured may either have a civil action by writ of conspiracy (of which we spoke in the preceding book) or the conspirators, for there must be at least two to form a conspiracy, may be indicted at the suit of the king, and were by the ancient common law to receive what is called the *villenous* judgment; *viz.*, to lose their *liberam legem*, whereby they are discredited and disabled as jurors or witnesses; to forfeit their goods and chattels, and lands for life; to have those lands wasted, their houses razed, their trees rooted up, and their own bodies committed to prison. But it now is the better opinion, that the

The various forms of conspiracy have been conveniently classified by Mr. Bishop, in his work on criminal law as follows: (1) *Conspiracies to defraud individuals*;—as by combining to cheat by making one drunk, and playing at cards with him falsely, (*State v. Younger*, 1 Dev. 357); or by making false representations in regard to the soundness of a horse, so as to defraud a purchaser. (*Queen v. Kenrick*, 5 Q. B. 49; *March v. People*, 7 Barb. 391.) (2) *Conspiracies to injure individuals otherwise than by fraud*;—as by combining to injure a trader by secretly adulterating or spoiling his wares, (*Rex v. Cope*, 1 Strange, 144); or to extort money from a person by bringing against him false charges; or to hiss an actor, etc. (3) *Conspiracies to disturb the course of government and of justice*;—as by scheming to procure a false indictment against a person, or to fabricate or suppress testimony in a particular trial. (2 Burrow, 993; see 148 Mass. 127.) (4) *Conspiracies to create public breaches of the peace*;—as by conspiring to commit an assault and battery. (*Comm. v. Putnam*, 29 Penn. St. 296.) (5) *Conspiracies to create public nuisances, and do other like injuries*. (6) *Conspiracies against both individuals and the community*. Under this head is included a form of conspiracy of considerable consequence, *viz.*, a combination among workmen to control the price of labor by “striking,” and coercing other workmen to unite with them or to cease laboring at lower rates, through threats or other means of intimidation; and so also as to the modern “boycott.” (55 Conn. 46; 59 Vt. 273; 84 Va. 927.) But it is not unlawful for workmen to agree that they will not labor at established rates, and to demand higher wages, if they do not interfere with the rights of others to labor for whatever price they may choose to receive. (*Master Stevedores’ Ass’n. v. Walsh*, 2 Daly, 1; see 32 N. J. L. 151; 23 Q. B. D. 598; 106 Mass. 1.)

A conspiracy requires at least two confederates. A husband and wife cannot be chargeable with this offense, since by common law they are regarded as one. If two conspirators are jointly charged, an acquittal of one operates as an acquittal of the other also; but if one die, the other may be tried singly. (See 12 Q. B. D. 241; also 2 Johns. Cas. 301.)

In some States, there are specific statutory regulations in regard to this offense, and the classification above given is superseded by one prescribed by the legislature. But these classifications are all quite similar in their general outline.

villénous judgment is by long disuse become obsolete ; it not having been pronounced for some ages : but instead thereof the delinquents are usually sentenced to imprisonment, fine, and pillory. To this head may be referred the offence of sending letters threatening to accuse any person of a crime punishable with death, transportation, pillory, or other infamous punishment, with a view to extort from him any money or other valuable chattels.

11. The next offence against public justice is when the suit is past its commencement, and come to trial. And that is, the crime of wilful and corrupt *perjury* : which is defined by Sir Edward Coke, to be a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *wilfully*, *absolutely*, and *falsely*, in a matter *material* to the issue or point in question.¹⁰ The law takes no notice of any

¹⁰ All the elements included in the definition given in the text, are essential to constitute the offense of perjury: (1.) There must have been a *lawful oath* administered. This rule requires that the suit, or proceeding in which the testimony is given, be one of which the court has jurisdiction, and that the oath be administered by one having due legal authority. If it be administered by the judge of a State court, out of the territorial jurisdiction of the State, or by an officer who acts under an illegal appointment, there is no perjury. (107 U. S. 671 ; 39 O. St. 496 ; 62 Ia. 54 ; 96 Pa. St. 285 ; 76 N. Y. 220 & 242.) The oath should be in the form which the law prescribes ; but an immaterial variation therefrom, or an innocent failure to observe the precise formalities which are requisite, will not render the oath less binding, or relieve the false witness from the guilt of perjury. Thus where a witness, in taking an oath, kissed a book which was believed by himself and the administering tribunal to be the Bible, but which was not so in fact, the oath was nevertheless held to be obligatory upon him. (*People v. Cook*, 8 N. Y. 67.) The material consideration is, whether the witness actually intended to bind his conscience ; if he did, he will be bound to the same extent as if the oath were in the proper form. And the same would be true if this was only his apparent intent ; as if he took an oath without objection, which, by reason of his religious belief, he did not consider binding, and purposely disregarded it. (*Sells v. Hoare*, 3 B. & B. 232.) The witness need not have been competent, nor compellable to testify ; it is sufficient that he gives testimony under oath, whether this be required of him, or be done voluntarily. (*Chamberlain v. People*, 23 N. Y. 85.) (2.) The proceeding must have been a *judicial* one ; it must have been such as the law authorizes in the regular administration of justice. It is a general rule, that an extrajudicial oath will not sustain an indictment for perjury. "A false oath, taken by one for the making of a bargain, that the thing sold is his own, is not punishable as perjury." (Hawkins, P. C. 431.) Thus, perjury cannot be assigned in false swearing before a court not

perjury but such as is committed in some court of justice, having power to administer an oath; or before some magistrate or proper officer, invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution: for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them. For which reason it is much to be questioned, how far any magistrate is justifiable in taking a voluntary *affidavit* in any extrajudicial matter, as is now too frequent upon every petty occasion: since it is more than possible, that by such idle oaths a man may frequently *in foro conscientia*, incur the guilt, and at the same time evade the temporal penalties of perjury. The perjury must also be corrupt (that is, committed *malo animo*), wilful, positive, and absolute: not upon surprise, or the like: it also must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance, to which no regard is paid, it is no more penal than in the voluntary extrajudicial oaths before mentioned. *Suborna-*

legally constituted. (*People v. Tracy*, 9 Wend. 265); or, at common law, before arbitrators, who have no power to administer an oath. (*People v. Townsend*, 5 How. Pr. 315.) Modern statutes, however, often declare it perjury to take a wilful false oath in proceedings other than judicial, where the administering of an oath is authorized or required by law. (See *Tuttle v. People*, 36 N. Y. 431; *People v. McCaffrey*, 75 Mich. 115; also 15 Gray, 438.) (3.) The swearing must be *wilful*, *absolute*, and *false*. It is not sufficient to constitute perjury that the testimony be false; for it may have been given under an innocent mistake of facts, or through inadvertence, or be attributable to imperfect observation, or inadequate investigation. There must, therefore, be a corrupt purpose, an intent to testify contrary to one's own knowledge or belief. And this corruptness of purpose renders it perjury to swear even to what is true, if the witness believes that he is testifying falsely. (*People v. McKinney*, 3 Parker, 510.) The evidence is corrupt as to him, though true in fact. (4.) The testimony must be *material* to the issue or point in question. This does not mean that it should be of itself sufficient to occasion an erroneous verdict or decision; it is enough that it has a direct tendency to produce such a result. Evidence tending to aggravate or reduce the amount of damages, is held to be material. So all testimony is material which is directly relevant to the matter in controversy, and calculated to affect, to any extent, the determination of the issue. But if it be wholly inapposite and unimportant, it cannot, though wilfully false, render a witness accountable for this crime. (*Wood v. People*, 59 N. Y. 117; Criminal Law Mag. iii. 459.)

There are statutes in relation to this crime in force in most of the United States; but these common law rules upon the subject have not been fundamentally changed, though, in some cases, they have been modified or extended. Subornation of perjury is also usually declared a crime by statute.

tion of perjury is the offence of procuring another to take such a false oath, as constitutes perjury in the principal. The punishment of perjury and subornation, at common law, has been various. It was anciently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods; and now it is fine and imprisonment, and never more to be capable of bearing testimony.

12. Bribery is the next species of offence against public justice; which is when a judge, or other person concerned in the administration of justice takes any undue reward to influence his behavior in his office.¹¹ In the East it is the custom never to petition any superior for justice, not excepting their kings, without a present. This is calculated for the genius of despotic countries; where the true principles of government are never understood, and it is imagined that there is no obligation from the superior to the inferior, no relative duty owing from the governor to the governed. The Roman law, though it contained many severe injunctions against bribery, as well for selling a man's vote in the senate or other public assembly, as for the bartering of common justice, yet by a strange indulgence in one instance, it tacitly encouraged this practice: allowing the magistrate to receive small presents, provided they did not in the whole exceed a hundred crowns in the year: not considering the insinuating nature and gigantic progress of this vice, when once admitted. Plato therefore more wisely, in his ideal republic, orders those who take presents for doing their duty to be punished in the severest manner: and by the laws of Athens he that offered was also prosecuted, as well as he that received a bribe. In England this offence of taking bribes is punished, in inferior officers, with fine and imprisonment; and in those who offer a bribe, though not taken, the same. But in judges, especially the superior ones, it hath been always looked upon as so heinous an offence, that

¹¹ This definition of bribery is not sufficiently comprehensive. It may be defined as the offence of giving, offering, or receiving anything of value for the purpose of corruptly influencing the official action of one holding public office, whether executive, legislative, or judicial. For it does not apply merely to the *taking* of a reward; nor does it extend to *judicial* officers alone, but to all persons acting in an official capacity. The essence of the crime is that it tends to produce corruption in office, and to prevent the administration of justice, and the proper performance of official duty. This offence is usually made the subject of statutory regulation.

the chief justice Thorpe was hanged for it in the reign of Edward III. And some notable examples have been made in parliament, of persons in the highest stations, and otherwise very eminent and able, contaminated with this sordid vice.

13. Embracery is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like. The punishment for the person embracing is by fine and imprisonment, and also for the juror so embraced.

14. Lastly, *extortion* is an abuse of public justice, which consists in any officer's unlawfully taking, by color of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due. The punishment is fine and imprisonment, and sometimes a forfeiture of the office.¹²

CHAPTER IX.

[BL. COMM.—BOOK IV. CH. XI.]

Of Offences against the Public Peace.

WE are next to consider offences against the public *peace*, the conservation of which is intrusted to the king and his officers, in the manner and for the reasons which were formerly mentioned at large. These offences are either such as are an actual breach of the peace: or constructively so, by tending to make others break it. Both of these species are also either felonious, or not felonious. The felonious breaches of the peace are strained up to that degree of malignity by virtue of several modern statutes: and, particularly,

1. The *riotous assembling* of *twelve* persons, or more, and not dispersing upon proclamation. The statute 1 Geo. I., ch. 5, enacts, generally, that if any twelve persons are unlawfully assembled to the disturbance of the peace, and any one justice of the peace, sheriff, under-sheriff, or mayor of a town, shall think proper to command them by proclamation to disperse, if

¹² The offenses of embracery and extortion are defined and regulated by express statutes, in many of the American States. (See, as to embracery, *Gibbs v. Dewey*, 5 Cowen 503; as to extortion, *People v. Whaley*, 6 Cowen, 661.)

they contemn his orders and continue together for one hour afterwards, such contempt shall be felony without benefit of clergy. And farther, if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading of it, such opposers and hinderers are felons without benefit of clergy : and all persons to whom such proclamation *ought to have been made*, and knowing of such hinderance, and not dispersing, are felons without benefit of clergy.

2. Affrays (from *affraier*, to terrify) are the fighting of two or more persons in some public place, to the terror of his majesty's subjects : for, if the fighting be in private, it is no *affray* but an *assault*. Affrays may be suppressed by any private person present, who is justifiable in endeavoring to part the combatants, whatever consequence may ensue. But more especially the constable, or other similar officer, however denominated, is bound to keep the peace ; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers ; and may either carry them before a justice, or imprison them by his own authority for a convenient space till the heat is over ; and may then perhaps also make them find sureties for the peace. The punishment of common affrays is by fine and imprisonment ; the measure of which must be regulated by the circumstances of the case ; for, where there is any material aggravation, the punishment proportionably increases. As where two persons coolly and deliberately engage in a duel ; this being attended with an apparent intention and danger of murder, and being a high contempt of the justice of the nation, is a strong aggravation of the affray, though no mischief has actually ensued. Another aggravation is, when thereby the officers of justice are disturbed in the due execution of their office : or where a respect to the particular place ought to restrain and regulate men's behavior, more than in common ones : as in the king's court and the like. Two persons may be guilty of an affray : but,

3. *Riots, routs, and unlawful assemblies*, must have *three* persons at least to constitute them. An *unlawful assembly* is when three or more do assemble themselves together to do an unlawful act, as to pull down enclosures, to destroy a warren or the game therein ; and part without doing it, or making any motion towards it. A *rout* is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a

right claimed of common or of way ; and make some advances towards it. A *riot* is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel : as if they beat a man ; or hunt and kill game in another's park, chase, warren, or liberty ; or do any other unlawful act with force and violence ; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner. By the statute 13 Hen. IV., ch. 7, any two justices, together with the sheriff or under-sheriff of the county, may come with the *posse comitatus*, if need be, and suppress any such riot, assembly, or rout, arrest the rioters, and record upon the spot the nature and circumstances of the whole transaction ; which record alone shall be a sufficient conviction of the offenders. In the interpretation of which statute it hath been holden, that all persons, noblemen, and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment ; and that any battery, wounding, or killing the rioters, that may happen in suppressing the riot is justifiable. So that our ancient law, previous to the modern riot act, seems pretty well to have guarded against violent breach of the public peace ; especially as any riotous assembly on a public or general account, as to redress grievances or pull down all enclosures, and also resisting the king's forces if sent to keep the peace, may amount to overt acts of high treason, by levying war against the king.¹

4. Another offence against the public peace is that of a *forcible entry* or *detainer* ; which is committed by violently taking or keeping possession of lands and tenements, with menaces, force, and arms, and without the authority of law. This was formerly allowable to every person disseized, or turned out of possession, unless his entry was taken away or barred by his own neglect, or other circumstances ; which were explained more at large in a former book. But this being found very prejudicial to the public peace, it was thought necessary by several statutes to restrain all persons from the use of such violent methods,

¹ These offenses here enumerated, viz: affrays, riots, routs, and unlawful assemblies, are also generally considered to be common law crimes, in the various States of this country, so far as statutes in relation to these subjects have not effected a change. But indictments for these crimes are quite unusual. (See *People v. White*, 55 Barb. 606 ; *State v. Russell*, 45 N. H. 83.)

even of doing themselves justice ; and much more if they have no justice in their claim. So that the entry now allowed by law is a peaceable one ; that forbidden is such as is carried on and maintained with force, with violence, and unusual weapons. By the statute 5 Ric. II., st. 1, ch. 8, all forcible entries are punished with imprisonment and ransom at the king's will. And by the several statutes of 15 Rich. II., ch. 2, 8 Hen. VI., ch. 9, 31 Eliz., ch. 11, and 21 Jac. I., ch. 15, upon any forcible entry or forcible detainer after peaceable entry, into any lands, or benefices of the church, one or more justices of the peace, taking sufficient power of the county, may go to the place, and there record the force upon his own view, as in case of riots ; and upon such conviction may commit the offender to jail, till he makes fine and ransom to the king. And moreover the justice or justices have power to summon a jury to try the forcible entry or detainer complained of : and, if the same be found by that jury, then, besides the fine on the offender, the justices shall make restitution by the sheriff of the possession, without inquiring into the merits of the title : for the force is the only thing to be tried, punished, and remedied by them : and the same may be done by indictment at the general sessions. But this provision does not extend to such as endeavor to maintain possession by force, where they themselves, or their ancestors, have been in the peaceable enjoyment of the lands and tenements, for three years immediately preceding.²

5. Besides actual breaches of the peace, anything that tends to provoke or excite others to break it, is an offence of the same denomination. Therefore *challenges to fight*, either by word or letter, or to be the bearer of such challenge, are punishable by fine and imprisonment, according to the circumstances of the offence. If this challenge arises on account of any money won at gaming, or if any assault or affray happen on such account, the offender by statute 9 Ann., ch. 14, shall forfeit all his goods to the crown, and suffer two years' imprisonment.

6. Of a nature very similar to challenges are *libels, libelli famosi*, which taken in their largest and most extensive sense, signify

² It is the generally established rule in this country, that forcible entry and detainer is an indictable offense. Statutes similar to those mentioned in the text, have also been enacted, providing for the restoration of possession to the party wrongfully evicted. The costs and expenses of the investigation which these statutes require to be instituted, are assessed upon the person making the wrongful entry. (See 119 U. S. 608 ; 122 U. S. 597 ; and *ante*, p. 721.)

any writings, pictures, or the like, of an immoral or illegal tendency; but, in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule.⁸ The direct tendency of these libels

⁸ The offense of libel, in its criminal as well as its civil aspect, has been fully considered in a previous note, so far as those modes of defamation are concerned, which are subject both to indictment and to civil action. (See *ante*, page 682, note (7).) But there are certain forms of libel which constitute criminal offenses, but cannot be made the basis of a civil action for damages, because they do not violate individual rights. All actionable libels are also indictable, but all indictable libels are not actionable. Those which are exclusively of a criminal character are of three principal classes;—libels which blacken the memory of the dead, libels upon the government, and obscene libels tending to corrupt the public morals. The first class is the most important. Libels of this kind are deemed detrimental to public welfare, since they tend to excite feelings of animosity on the part of relatives and friends of the deceased, and to provoke them to measures of retaliation. Such libels, as well as those which injure the reputation of a living person, derive their criminality from their presumed tendency to occasion a breach of the public peace. But it is only such criticism upon the character or actions of a deceased person as is made from malicious motives, with intent to degrade his memory, that is indictable as a criminal libel. Temperate and candid discussion of his actions, motives of conduct, traits of character, etc., is permissible.

Libels against the government consist of calumnious publications in denunciation or unwarrantable criticism of the established system of government, or the regular methods of administration, when their evident design or natural tendency is to promote disaffection among the citizens, or to excite a spirit of revolution. But indictments for libels of this kind are very rare, and may be said to be unknown in modern jurisprudence.

Obscene or immoral libels are such indecent or immoral publications as tend to destroy the love of purity, morality and virtue, and corrupt the public morals. But there are usually, at the present day, special statutory regulations to prevent the circulation of such publications, and to punish those who attempt to issue them. They are, moreover, not now generally termed libels, though so classified at common law.

But the most common forms of libel are those which are defamatory to the reputation of some living person, and constitute both civil and criminal offenses. There is one point of considerable importance in reference to such libels, which is not considered in the previous note upon this subject. This is in relation to the power of the court and of the jury in the construction of the libellous charges. In a civil action, where the words of an alleged libel are unambiguous, it is for the court to determine whether they are libellous in fact, and not for the jury. But if there is doubt in regard to the defamatory character of the expressions used, this question is to be decided by the

is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law : and therefore the sending an abusive letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace. For the same reason it is immaterial with respect to the essence of a libel whether the matter of it be true or false ; since the provocation, and not the falsity, is the thing to be punished criminally : though, doubtless, the falsehood of it may aggravate its guilt, and enhance its punishment. In a civil action, we may remember, a libel must appear to be false, as well as scandalous ; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence it may be against the public peace ; and therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit. But, in a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the whole that the law considers. And therefore, in such prosecutions, the only points to be inquired into are, first, the making or publishing of the book or writing ; and, secondly, whether the matter be criminal : and, if both these points are against the defendant, the offence against the public is complete.

In this and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less degree of severity ; the *liberty of the press*, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the

jury. The Court of King's Bench in England held, in several early cases, that a similar rule applied in criminal prosecutions for libel ; but this doctrine was much controverted ; and finally a statute was passed, declaring that the jury might render a verdict of guilty or not guilty upon the whole matter in issue, and thus act as judges both of the law and the fact. This is an anomalous doctrine in criminal law, and peculiar to this offense. Similar statutes, or constitutional provisions, have been generally adopted in many States of this country.

The truth is always a defense to a civil action for libel, but not to a criminal prosecution, unless proved to have been published with good motives and for justifiable ends. At common law, it was never a defense upon an indictment, but this modification of the former rule has been effected in modern times by statute

nature of a free state ; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public ; to forbid this, is to destroy the freedom of the press : but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free ; the abuse only of that free-will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry : liberty of private sentiment is still left ; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man (says a fine writer on this subject) may be allowed to keep poisons in his closet, but not publicly vend them as cordials. And to this we may add, that the only plausible argument heretofore used for the restraining the just freedom of the press, “ that it was necessary to prevent the daily abuse of it,” will entirely lose its force, when it is shown (by a seasonable exertion of the laws) that the press cannot be abused to any bad purpose, without incurring a suitable punishment : whereas it never can be used to any good one, when under the control of an inspector. So true it will be found, that to censure the licentiousness, is to maintain the liberty of the press.

CHAPTER X.

[BL. COMM.—BOOK II. CH. XII.]

Of Offences Against Public Trade.

OFFENCES against public *trade* are,

1. Smuggling, or the offence of importing goods without paying the duties imposed thereon by the laws of the customs and excise. This is restrained by a great variety of statutes, which inflict pecuniary penalties and seizure of the goods for clandestine smuggling; the last of them, 19 Geo. II., ch. 34, is for the purpose *instar omnium*; enacting, that if three or more persons shall assemble, with fire-arms or other offensive weapons, to assist in the illegal exportation or importation of goods, or in rescuing the same after seizure, or in rescuing offenders in custody for such offences; or shall pass with such goods in disguise; or shall wound, shoot at, or assault any officers of the revenue when in the execution of their duty; such persons shall be felons without the benefit of clergy.¹

2. Another offence against public trade is fraudulent *bankruptcy*, which was sufficiently spoken of in a former volume; I shall therefore now barely mention the several species of fraud taken notice of by the statute law; *viz.*, the bankrupt's neglect of surrendering himself to his creditors; his nonconformity to the directions of the several statutes; his concealing or embezzling his effects to the value of 20*l.*; and his withholding any books or writings with intent to defraud his creditors: all which the policy of our commercial country has made felony without benefit of clergy. And indeed it is allowed by such as are the most averse to the infliction of capital punishment, that the offence of fraudulent bankruptcy, being an atrocious species of the *crimen falsi*,

¹ This statute has been superseded by a recent act (39 & 40 Vict., ch. 36), whose provisions, however, are similar in the main to those of the earlier act. The severity of the penalties prescribed has been much mitigated. In this country, there are various acts of Congress in force for the prevention and punishment of smuggling.

ought to be put upon a level with those of forgery and falsifying the coin.²

3. Usury, which is an unlawful contract upon the loan of money, to receive the same again with exorbitant increase. Of this also we had occasion to discourse at large in a former volume. We there observed that by statute 37 Hen. VIII., ch. 9, the rate of interest was fixed at 10*l. per cent. per annum*, which the statute 13 Eliz., ch. 8, confirms: and ordains that all brokers shall be guilty of a *præmunire* that transact any contracts for more, and the securities themselves shall be void. The statute 21 Jac. I., ch. 17, reduced interest to eight *per cent.*; and, it having been lowered in 1650, during the usurpation, to six *per cent.*, the same reduction was re-enacted after the restoration by statute 12 Car. II., ch. 13; and lastly, the statute 12 Ann. st. 2, ch. 16, has reduced it to five *per cent.* Wherefore not only all contracts for taking more are in themselves totally void, but also the lender shall forfeit treble the money borrowed. Also, if any scrivener or broker takes more than five shillings *per cent.* procuration-money, or more than twelpence for making a bond, he shall forfeit 20*l.* with costs, and shall suffer imprisonment for half a year.³

²The present English bankrupt law, which has superseded the statutes referred to in the text, declares the same classes of acts criminal as are here mentioned, together with various other fraudulent acts, which are specifically defined by the statute (46 & 47 Vict., ch. 152.) A bankrupt convicted of such acts is held guilty of a misdemeanor, and punishable by imprisonment for not more than three years. (See 32 & 35 Vict., c. 62.)

The United States bankrupt law lately repealed declared it to be an offense punishable by imprisonment, with or without hard labor, for not more than three years, if the bankrupt debtor (1) secretes or conceals any property belonging to his estate; (2) parts with, destroys, alters, mutilates, or falsifies any book, deed or document, relating thereto; (3) removes any such property, or book, deed or document out of the district, or otherwise disposes of it to prevent it from coming into the possession of the assignee, or to hinder him from recovering the same; (4) makes any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate, with the like intent; (5) attempts to account for any of his property by fictitious losses or expenses, etc., etc. (See *ante*, p. 582, note 2.)

³The statutory penalties for usury have been entirely abolished in England; but, in some of the United States, similar penalties are still prescribed by law for this offense. Thus, in New York, it is a misdemeanor punishable by fine or imprisonment, or both, to take a higher rate of interest than six per cent. But, in some of the States, though the taking of usury is

4. Cheating is another offense, more immediately against public trade; as that cannot be carried on without a punctilious regard to common honesty, and faith between man and man.⁴

prohibited, yet it is not now held to be a criminal offense; and in some, the parties to any transaction are allowed to agree upon such a rate of interest as they prefer.

⁴ *Cheat*.—A cheat, by the common-law, is the crime of defrauding a person by the use of some false token or symbol, by which he is deceived and misled. Fraud accomplished by false oral representations merely, is not indictable, but there must be some outward and visible sign or token employed. A mere lie, though it may be relied upon, and occasion loss to the person deceived, is not, at common-law a cheat. Thus, if one obtains credit at a store by falsely representing that he is engaged in trade; or gets into his possession a note, by pretending that he wishes to look at it, and then carries it away; no indictable cheat is committed, since no false symbol is used. (*Comm. v. Warren*, 6 Mass. 72; *People v. Miller*, 14 Johns. 371.) But if commodities exposed for sale, were marked with false brands, which were calculated to deceive the public in regard to their quality, weight, etc., this would constitute a cheat; the packages with their marks being deemed false tokens. And the nice distinction has been taken in the law, that, while it is an indictable cheat to pay for goods purchased by the check of a third person, which, though known to be valueless, is represented to be good, yet it would not be a cheat to present one's own false check under like circumstances. In the one case, the instrument is deemed to be a false token, in the other it is merely a false representation of the person presenting it, which, though reduced to writing, is no more a token, than when made orally. So it would be a cheat to obtain goods from a dealer by means of a written order, falsely purporting to be drawn by another person; or to purchase articles, paying therefor in bills known to be counterfeit, or worthless. (*Comm. v. Boynton*, 2 Mass. 77.) False personation seems to have been regarded as a common-law cheat; as, where a person by adopting a particular mode of dress, or assuming a particular appearance, causes himself to be taken for another person, and thus accomplishes a fraud. In order that the fraudulent act may amount to a cheat, it is necessary that the person claiming to have been defrauded, should have acted upon confidence in the token or symbol employed. If his action were attributable to other causes, there is but an attempt to cheat. This, however, is also indictable at common law.

False Pretences.—This doctrine of the common-law that fraud, to be indictable, must be accomplished by means of a false token or symbol, led to the enactment of statutes declaring it criminal to obtain goods or property by *false pretences*, though no symbol were used. Statutes, similar to those of England, have been generally enacted in the several American States, and the leading principles established under them may be briefly summarized as follows:—*False pretences* may be defined as false representations, with intent to defraud, by words or acts, concerning past or present facts and events. False statements, in the form of a *promise*, will not constitute false

Hither therefore may be referred that prodigious multitude of statutes, which are made to restrain and punish deceits in particular trades, and which are enumerated by Hawkins and Burn, pretences, since they relate to the future, and are the subject, not of positive knowledge, but of anticipation and intent. Thus, if a man obtains goods by promising to pay for them on delivery, with intent to defraud the owner of them, it is not a case of false pretences; nor if a man obtain money from a woman by promising to marry her at a future day. (*Queen v. Johnston*, 2 Moody, 254; see 132 Mass. 16; 90 N. Y. 314; 99 Pa. St. 570.) It is also the generally established doctrine, that no statements in regard to future events are indictable under these statutes, whether in the form of a promise or not. There must be a false assertion as to some *existing* matter, by which a person is induced to part with his money or property. Thus, it is a sufficient false pretence to assert that one owns personal property, which he does not own, and thereby to obtain a loan (*Comm. v. Lincoln*, 11 Allen, 233); or to obtain goods from a dealer by falsely representing one's self to be in the employment of a particular person, who, it is pretended, sends for them (*People v. Johnson*, 12 Johns. 292); or to falsely represent that a check given in payment for goods is genuine and valid, and that there are funds in the bank for its payment. (*Smith v. People*, 47 N. Y. 303; see also *Comm. v. Wallace*, 114 Pa. St. 405; *State v. Hill*, 72 Me. 238; *Comm. v. Lee*, 149 Mass. 179.)

The false pretence need not be in words, but may be by acts; as, where, in an English case, a person in Oxford, not a member of the University, went to a store, wearing the usual cap and gown of a student, and thus was enabled to obtain credit. (*Rex v. Barnard*, 7 C. & P. 784.) False personation is a sufficient false pretence; as, where a person assumes the name of another, and by this artifice accomplishes a fraudulent design. (*Comm. v. Wilgus* 4 Pick. 177.) But mere expressions of opinion, or the common exaggerations of speech, do not constitute false pretences; thus, a representation as to the value of a watch left in pawn, was deemed to be a mere expression of opinion, which would not sustain an indictment. (*State v. Estes*, 46 Me. 150; *Comm. v. Wood*, 142 Mass. 459.)

In order that this offense may be complete, it is necessary that the fraud be actually perpetrated, and that the false pretence be the efficient cause of its accomplishment. If no reliance was placed upon the false representation, or if it was so far disregarded that other inducements proved the controlling motives of action, no indictment can be sustained. It is not necessary however, that the false pretence, in order to be criminal, should be the sole operative cause of the injury, as it may concur with others which have also an influence over the mind of the person deceived. It must, however, be so far material, that, unless it had been practised, the transaction resulting in injury would not have been consummated. (*People v. Haynes*, 11 Wend. 557; 14 Wend. 546.) The pretence must be believed, and be the predominant cause of action. (*People v. Herrick*, 13 Wend. 87; *People v. Stetson*, 4 Barb. 151.) It has been held in New York, that if the property obtained by false pretences were given with intent to procure a violation of

but are chiefly of use among the traders themselves. The offence also of *breaking the assize* of bread, or the rules laid down by the law, for ascertaining its price in every given quantity, is reducible to this head of cheating; as is likewise in a peculiar manner the offence of selling by *false weights and measures*. The punishment of bakers breaking the assize, was anciently to stand in the pillory, and for brewers to stand in the tumbrel or dungcart: which, as we learn from domesday book, was the punishment for knavish brewers in the city of Chester so early as the reign of Edward the Confessor. But now the general punishment for all frauds of this kind, if indicted (as they may be) at common law, is by fine and imprisonment: though the easier and more usual way is by levying on a summary conviction, by distress and sale, the forfeitures imposed by the several acts of parliament. Lastly, any deceitful practice, in cozening another by artful means, whether in matters of trade or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment, and pillory. And by the statutes 33 Hen. VIII., ch. 1, and 30 Geo. II., ch. 24, if any man defrauds another of any valuable chattels by color of any false token, counterfeit letter, or false pretence, or pawns or disposes of another's goods without the consent of the owner, he shall suffer such punishment by imprisonment, fine, pillory, transportation, whipping, or other corporal pain, as the court shall direct.

law, no indictment for the false pretences can be sustained; as, where a person falsely pretended to be an officer of the law, and to have a warrant against another, who was thereby induced to give a watch and diamond ring to the supposed officer to bribe him to violate his official duty. (*McCord v. People*, 46 N. Y. 470; *People v. Stetson*, 4 Barb. 151.) But, in some States, this doctrine has been denied. (*Comm. v. Morrill*, 8 Cush. 571.)

There has, moreover, been much discussion upon the point whether the false pretence, in order to be indictable, must be such as would deceive a person of ordinary prudence, or whether it would be sufficient that a fraud was actually accomplished, though the person deceived were of less than ordinary prudence. There are many cases, particularly in this country, which make ordinary prudence and caution the distinguishing test of responsibility, but some recent cases of high authority take the other view. (See *People v. Williams*, 4 Hill, 9; *People v. Sully*, 5 Parker, 142; *People v. Court of Oyer, etc.*, 83 N. Y. 436; *Watson v. People*, 87 N. Y. 561; *State v. Montgomery*, 56 Ia. 195; *Johnson v. State*, 36 Ark. 242; *State v. Burnett*, 119 Ind. 392.)

CHAPTER XI.

[BL. COMM.—BOOK IV. CH. XIII.]

Of Offences Against the Public Police or Economy.

THE last species of offences which especially affect the commonwealth, are those against the public *police* or *economy*. By the public police and economy I mean the due regulation and domestic order of the kingdom; whereby the individuals of the State, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations. This head of offences must therefore be miscellaneous, as it comprises all such crimes as especially affect public society, and are not comprehended under any of the preceding species.

1. A felonious offence, with regard to the holy estate of matrimony, is what some have corruptly called *bigamy*, which properly signifies being twice married; but is more justly denominated *polygamy*, or having a plurality of wives at once. Such second marriage, living the former husband or wife, is simply void, and a mere nullity, by the ecclesiastical law of England: and yet the legislature has thought it just to make it felony, by reason of its being so great a violation of the public economy and decency of a well ordered State. For polygamy can never be endured under any rational civil establishment, whatever specious reasons may be urged for it by the eastern nations, the fallaciousness of which has been fully proved by many sensible writers: but in northern countries the very nature of the climate seems to reclaim against it; it never having obtained in this part of the world, even from the time of our German ancestors, who, as Tacitus informs us, "*prope soli barbarorum singulis uxoribus contenti sunt.*" It is therefore punished by the laws both of ancient and modern Sweden with death. And with us in England it is enacted by statute 1 Jac. I., ch. 11, that if any person, being married, do afterwards marry again, the former husband or wife

being alive, it is felony ; but within the benefit of clergy. The first wife in this case shall not be admitted as a witness against her husband, because she is the true wife ; but the second may, for she is indeed no wife at all ; and so *vice versa*, of a second husband. This act makes an exception to five cases, in which such second marriage, though in the three first it is void, is yet no felony. 1. Where either party hath been continually *abroad* for seven years, whether the party in England hath notice of the other's being living or no. 2. Where either of the parties hath been absent from the other seven years *within* th's kingdom, and the remaining party hath had no knowledge of the other's being alive within that time. 3. Where there is a divorce (or separation *a mensa et thoro*) by sentence in the ecclesiastical court. 4. Where the first marriage is declared absolutely void by any such sentence, and the parties loosed *a vinculo*. Or, 5. Where either of the parties was under the age of consent at the time of the first marriage, for in such case the first marriage was voidable by the disagreement of either party, which the second marriage very clearly amounts to. But if at the age of consent the parties had agreed to the marriage, which completes the contract, and is indeed the real marriage ; and afterwards one of them should marry again ; I should apprehend that such second marriage would be within the reason and penalties of the act.¹

¹ It is enacted, by statute 24 & 25 Vict., ch. 100, § 57, superseding the statute mentioned in the text, that whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere, shall be guilty of felony ; and any such offender may be tried in any place in England, where he shall be apprehended, or be in custody, in the same manner in all respects as if the offense had been actually committed there ; but this enactment does not extend (1) to any second marriage contracted elsewhere than in England or Ireland, by any other than a subject of Her Majesty, or (2) to any person marrying a second time, whose husband shall have been continually absent from such person for the space of seven years, then last past, and shall not have been known by such person to have been living within that time, or (3) to any person, who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or (4) to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction. (See 23 Q. B. D. 168.)

Statutes, similar to this in its general outline and substantial features have been passed in the various States of this country ; but the limit in regard to the time of absence has been variously changed. (See 133 U. S. 333.)

2. *Common nuisances* are a species of offence against the public order and economical regimen of the State; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires. The nature of *common* nuisances, and their distinction from *private* nuisances, were explained in the preceding book: when we considered more particularly the nature of the private sort, as a civil injury to individuals. I shall here only remind the student that common nuisances are such inconvenient and troublesome offences, as annoy the whole community in general, and not merely some particular person; and therefore are indictable only, and not actionable; as it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow-subjects.² Of this nature are, I. Annoyances in *highways, bridges,*

² A nuisance, in order to be *public* or *common*, must be such as interferes with some public right, vested in the community as a legal entity; as, by interfering with the public right of passage upon highways, rivers, bridges, etc., by endangering or impairing the general health or morals, by interfering with the public welfare, etc. Thus, it is a public nuisance to manufacture or to keep carelessly in large quantities, in towns or closely inhabited places, gunpowder or other dangerous explosive substances, since this tends directly to public detriment. (*Myers v. Malcolm*, 6 Hill, 292; *Heeg v. Licht*, 80 N. Y. 579.) Every unauthorized obstruction of a highway is indictable as a nuisance. (*People v. Horton*, 64 N. Y. 610; see 111 Pa. St. 204.) It will not excuse the carrying on of a noisome and offensive trade or manufacture, that such industrial enterprises are necessary for the supply of useful commodities to society, or that they redound greatly to the general advantage, for some place must be chosen for such trades, where their offensiveness will not occasion public detriment. No length of time will legalize a public nuisance, though a prescriptive right may be gained to continue a private nuisance. Nor will it be any defense to an indictment, that the nuisance was erected remote from any habitation, and that those complaining thereof afterwards erected buildings in the vicinity. (*Taylor v. People*, 6 Parker, 347.) The growth and development of industrial and business centres cannot be suffered to be impeded by the erection and continuance of public nuisances. A public nuisance is also private, when it occasions special damage to an individual; and he may then exercise the right of abatement, so far as his rights are interfered with, and will also have a right of action to recover damages for the injury sustained. But a public nuisance is not necessarily private. There are many forms of nuisances, particularly those which are injurious to public health or morals, whose abatement by public authority, or whose indictment, are specially provided for by legislative enactments or city ordinances. (*Lawton v. Steele*, 119 N. Y. 226; see 105 N. Y. 46; 135 Mass. 490.)

and public *rivers*, by rendering the same inconvenient or dangerous to pass, either positively, by actual obstructions ; or negatively by want of reparations. For both of these, the person so obstructing, or such individuals as are bound to repair and cleanse them, or (in default of these last) the parish at large, may be indicted, distrained to repair and mend them, and in some cases fined. And a presentment thereof by a judge of assize, &c. or a justice of the peace, shall be in all respects equivalent to an indictment. Where there is a house erected, or an inclosure made, upon any part of the king's demesnes, or of an highway, or common street, or public water, or such like public things, it is properly called a *purpresture*. 2. All those kinds of nuisances (such as offensive trades and manufactures), which when injurious to a private man are actionable, are, when detrimental to the public, punishable by public prosecution, and subject to fine according to the quantity of the misdemeanor : and particularly the keeping of hogs in any city or market town is indictable as a public nuisance. All disorderly *inns* or *ale-houses*, *bawdy-houses*, *gaming-houses*, *stage-plays*, unlicensed booths and stages for *rope-dancers*, *mountebanks*, and the like, are public nuisances, and may upon indictment be suppressed and fined. .

CHAPTER XII.

[BL. COMM.—BOOK IV. CH. XIV.]

Of Homicide.

IN the preceding chapters we have considered, first, such crimes and misdemeanors as violate or transgress the law of nations ; secondly, such as more especially affect the king, the father and representative of his people ; thirdly, such as more directly infringe the rights of the public or commonwealth, taken in its collective capacity ; and are now, lastly, to take into consideration those which in a more peculiar manner affect and injure *individuals* or private subjects.

Were these injuries indeed confined to individuals only, and

did they affect none but their immediate objects, they would fall absolutely under the notion of private wrongs ; for which a satisfaction would be due only to the party injured ; the manner of obtaining which was the subject of our inquiries in the preceding book. But the wrongs, which we are now to treat of, are of a much more extensive consequence ; 1. Because it is impossible they can be committed without a violation of the laws of nature ; of the moral as well as political rules of right : 2. Because they include in them almost always a breach of the public peace : 3. Because by their example and evil tendency they threaten and endanger the subversion of all civil society. Upon these accounts it is, that, besides the private satisfaction due and given in many cases to the individual, by action for the private wrong, the government also calls upon the offender to submit to public punishment for the public crime. And the prosecution of these offences is always at the suit and in the name of the king, in whom by the texture of our constitution the *jus gladii*, or executory power of the law, entirely resides. Thus too, in the old Gothic constitution, there was a threefold punishment inflicted on all delinquents ; first, for the private wrong to the party injured ; secondly, for the offence against the king by disobedience to the laws ; and thirdly, for the crime against the public by their evil example. Of which we may trace the groundwork, in what Tacitus tells us of his Germans ; that, whatever offenders were fined, “ *pars mulctæ regi, vel civitati, pars ipsi, qui vindicatur vel propinquis ejus, exsolvitur.*”

These crimes and misdemeanors against private subjects are principally of three kinds ; against their *persons*, their *habitations*, and their *property*.

Of crimes injurious to the *persons* of private subjects, the most principal and important is the offence of taking away that life, which is the immediate gift of the great Creator ; and of which therefore no man can be entitled to deprive himself or another, but in some manner either expressly commanded in, or evidently deducible from, those laws which the Creator has given us ; the divine laws, I mean, of either nature or revelation. The subject therefore of the present chapter will be the offence of *homicide* or destroying the life of man, in its several stages of guilt, arising from the particular circumstances of mitigation or aggravation which attend it.

Now homicide, or the killing of any human creature, is of three kinds : *justifiable*, *excusable*, and *felonious*. The first has no share of guilt at all ; the second very little : but the third is the highest crime against the law of nature that man is capable of committing.

I. Justifiable homicide is of divers kinds.

1. Such as is owing to some unavoidable *necessity*, without any will, intention, or desire, and without any inadvertence or negligence in the party killing, and therefore without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the execution of **public justice**, to put a malefactor to death, who hath forfeited his life by the laws and verdict of **his country**. This is an act of necessity, and even of civil duty ; and therefore not only justifiable, but commendable, where the law requires it. But the law must *require* it, otherwise it is not justifiable : therefore, wantonly to kill the greatest of malefactors, a felon or a traitor, attainted, or outlawed, deliberately, uncompelled, and extrajudicially, is murder. For, as Bracton very justly observes, "*istud homicidium, si fit ex livore, vel delectatione effundendi humanum sanguinem, licet juste occidatur iste, tamen occisor peccat mortaliter, propter intentionem corruptam.*" And farther, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder. And upon this account Sir Matthew Hale himself, though he accepted the place of a judge of the common pleas under Cromwell's government (since it is necessary to decide the disputes of civil property in the worst of times), yet declined to sit on the crown side at the assizes, and try prisoners ; having very strong objections to the legality of the usurper's commission ; a distinction perhaps rather too refined ; since the punishment of crimes is at least as necessary to society, as maintaining the boundaries of property. Also such judgment, when legal, must be executed by the proper officer, or his appointed deputy ; for no one else is *required* by law to do it, which requisition it is that justifies the homicide. If another person doth it of his own head, it is held to be murder : even though it be the judge himself. It must farther be executed, *servato juris ordine* ; it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice versa*, it is murder : for he is merely ministerial, and therefore

only justified when he acts under the authority and compulsion of the law : but if a sheriff changes one kind of death for another, he then acts by his own authority, which extends not to the commission of homicide, and besides, this license might occasion a very gross abuse of his power. The king indeed may remit part of a sentence ; as in the case of treason, all but the beheading ; but this is no change, no introduction of a new punishment ; and in the case of felony, where the judgment is *to be hanged*, the king (it hath been said) cannot legally order even a peer to be beheaded. But this doctrine will be more fully considered in a subsequent chapter.

Again ; in some cases homicide is justifiable, rather by the *permission*, than by the absolute *command*, of the law, either for the *advancement* of public *justice*, which without such indemnification would never be carried on with proper vigor or, in such instances where it is committed for the *prevention* of some atrocious *crime*, which cannot otherwise be avoided.

2. Homicides, committed for the *advancement* of public *justice*, are ; 1. Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him. 2. If an officer, or any private person, attempts to take a man charged with felony, and is resisted ; and, in the endeavor to take him, kills him. This is similar to the old Gothic constitutions, which (Stiernhook informs us) "*furem, si aliter capi non posset, occidere permittunt.*" 3. In case of a riot, or rebellious assembly, the officers endeavoring to disperse the mob are justifiable in killing them, both at common law, and by the riot act, 1 Geo. I., ch. 5. 4. Where the prisoners in a jail, or going to a jail, assault the jailer, or officer, and he in his defence kills any of them, it is justifiable for the sake of preventing an escape. But in all these cases, there must be an apparent necessity on the officer's side ; *viz.*, that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, unless such homicide were committed, otherwise, without such absolute necessity, it is not justifiable.

3. In the next place, such homicide as is committed for the *prevention* of any forcible and atrocious *crime*, is justifiable by the law of nature : and also by the law of England, as it stood so early as the time of Bracton, and it is since declared in statute 24 Hen. VIII., ch. 5. If any person attempts a robbery or

murder of another, or attempts to break open a house *in the night-time* (which extends also to an attempt to burn it), and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to any crime unaccompanied with force, as picking of pockets ; or to the breaking open of any house *in the day-time*, unless it carries with it an attempt of robbery also. So the Jewish law, which punished no theft with death, makes homicide only justifiable in case of *nocturnal* house-breaking ; if a thief be found breaking up, and he be "smitten that he die, no blood shall be shed for him : but if the sun be risen upon him, there shall blood be shed for him ; for he should have made full restitution." At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact : and by the Roman law of the twelve tables, a thief might be slain by night with impunity : or even by day, if he armed himself with any dangerous weapon : which amounts to nearly the same as is permitted by our own constitutions.

The Roman law also justifies homicide, when committed in defence of the chastity either of one's self or relations : and so also, according to Selden, stood the law in the Jewish republic. The English law likewise justifies a woman killing one who attempts to ravish her : and so too the husband or father may justify killing a man, who attempts a rape upon his wife or daughter : but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other. And I make no doubt but the forcibly attempting a crime of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own, and all other laws, seems to be this ; that where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting. But we must not carry this doctrine to the same visionary length that Mr. Locke does : who holds, "that all manner of force without right upon a man's person, puts him in a state of war with the aggressor ; and, of consequence, that being in such state of war, he may lawfully kill him that puts him under this unnatural restraint." However just this conclusion may be in a state of uncivilized nature, yet the law of England, like that of every other well-regulated community, is too tender of the public peace, too careful of the lives of the subjects, to adopt so

contentious a system ; nor will suffer with impunity any crime to be *prevented* by death, unless the same, if committed, would also be *punished* by death.¹

In these instances of *justifiable* homicide, it may be observed that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame. But that is not quite the case in *excusable* homicide, the very name whereof imports some fault, some error, or omission : so trivial, however, that the law excuses it from the guilt of felony, though in strictness it judges it deserving of some little degree of punishment.

II. Excusable homicide is of two sorts ; either *per infortunium*, by misadventure ; or *se defendendo*, upon a principle of self-preservation. We will first see wherein these two species of homicide are distinct, and then wherein they agree.

1. Homicide *per infortunium* or *misadventure*, is where a man, doing a lawful act, without any intention of hurt, unfortunately kills another : as where a man is at work with a hatchet, and the head thereof flies off, and kills a stander-by ; or where a person qualified to keep a gun, is shooting at a mark, and undesignedly kills a man : for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure ; for the act of correction is lawful : but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder ; for the act of immoderate correction is unlawful. Thus, by an edict of the emperor Constantine, when the rigor of the Roman law with regard to slaves began to relax and soften, a

¹ One who is opposing and endeavoring to prevent a forcible and atrocious felony may lawfully use all necessary force for that purpose, and resist all attempts to inflict bodily injury upon himself, even to the killing of the felon. (*Ruloff v. People*, 45 N. Y. 213.) It is not necessary for his justification to prove that the felony would actually have been committed, if the wrongdoer's life had not been taken ; for a man is justified, under such circumstances, in acting as if the danger really existed, where there is reasonable apprehension of danger, *i.e.*, such ground to anticipate the commission of the threatened crime, as would satisfy a man of prudence, caution, and discretion, that it would really be consummated. (2 N. Y. 193 ; 131 Mass. 423 ; 69 Ia. 426.)

master was allowed to chastise his slaves with rods and imprisonment, and, if death accidentally ensued, he was guilty of no crime: but if he struck him with a club or a stone, and thereby occasioned his death; or if in any other yet grosser manner, "*immoderate suo jure utatur, tunc reus homicidii sit.*"

But to proceed. A tilt or tournament, the martial diversion of our ancestors, was, however, an unlawful act: and so are boxing and sword-playing, the succeeding amusement of their posterity: and, therefore, if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony or manslaughter. But if the king command or permit such diversion, it is said to be only misadventure; for then the act is lawful. In the like manner as by the laws both of Athens and Rome, he who killed another in the *pancratium*, or public games authorized or permitted by the State, was not held to be guilty of homicide. Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he had done nothing unlawful: but manslaughter in the person who whipped him, for the act was a trespass and at best a piece of idleness, of inevitably dangerous consequence. And in general, if death ensues in consequence of an idle, dangerous, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing, in these and similar cases, the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts.

2. Homicide in *self-defence*, or *se defendendo*, upon a sudden affray, is also excusable, rather than justifiable, by the English law. This species of self-defence must be distinguished from that just now mentioned, as calculated to hinder the perpetration of a capital crime; which is not only a matter of excuse, but of justification. But the self-defence which we are now speaking of, is that whereby a man may protect himself from an assault or the like, in the course of a sudden broil or quarrel, by killing him who assaults him. And this is what the law expresses by the word *chance-medley*, or (as some rather choose to write it) *chaud-medley*, the former of which in its etymology signifies a *casual* affray, the latter an affray in the *heat* of blood or passion; both of them of pretty much the same import: but the former is in common speech too often erroneously applied to any manner of homicide by misadventure; where

as it appears by the statute 24 Henry VIII., ch. 5, and our ancient books, that it is properly applied to such killing as happens in self-defence upon a sudden rencounter. This right of natural defence does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence, but in sudden and violent cases when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his assailant.

It is frequently difficult to distinguish this species of homicide (upon *chance-medley* in self-defence) from that of manslaughter, in the proper legal sense of the word. But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer has not begun the fight, or (having begun) endeavors to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. For which reason the law requires, that the person, who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that not factitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow-subjects the law countenances no such point of honor: because the king and his courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves. In this the civil law also agrees with ours, or perhaps goes rather farther: "*qui cum aliter tueri se non possunt, damni culpam dederint, innoxii sunt.*" The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him: for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm: and then in his de-

fence he may kill his assailant instantly.² And this is the doctrine of universal justice, as well as of the municipal law.

And as the *manner* of the defence, so is also the *time* to be considered: for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge, and not defence. Neither under the color of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder: for if two persons, A and B, agree to fight a duel, and A gives the first onset, and B retreats as far as he safely can, and then kills A, this is murder; because of the previous malice and concerted design. But if A upon a sudden quarrel, assaults B first, and upon B's returning the assault, A really and *bona fide* flees; and, being driven to the wall, turns again upon B and kills him: this may be *se defendendo* according to some of our writers; though others have thought this opinion too favorable; inasmuch as the necessity, to which he is at last reduced, originally arose from his own fault. Under this excuse, of self-defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself.

There is one species of homicide *se defendendo*, where the party slain is equally innocent as he who occasions his death: and yet this homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish. As, among others, in that case mentioned by Lord Bacon, where two persons, being shipwrecked, and getting on the same plank, but finding it not able to save them both,

² One who is himself without fault, if attacked by another, may kill his assailant, if the circumstances be such as to furnish reasonable ground for apprehending a design to take his life, or do him great bodily harm, and that the danger is imminent, though, in point of fact, there was no design to do him bodily harm, nor danger that it would be done. (*Shorter v. People*, 2 N. Y. 193; *Patterson v. People*, 46 Barb. 625.) But when one believes himself about to be attacked by another, it is his duty, if possible, to avoid it; the right of attack for self-defense does not arise until he has done everything in his power to avoid its necessity. (*People v. Sullivan*, 7 N. Y. 396.) A person assaulted should "retreat to the wall," unless the danger is such as to forbid (69 Ia. 705; 90 Mo. 608; 67 Cal. 646; see 73 Mich. 15.)

one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expense of another man's is excusable through unavoidable necessity, and the principle of self-defence: since their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and an endangering of, each other's life.†

Let us next take a view of those circumstances wherein these two species of homicide, by misadventure and self-defence, agree; and those are in their blame and punishment. For the law sets so high a value upon the life of a man, that it always intends some misbehavior in the person who takes it away unless by the command or express permission of the law. In the case of misadventure, it presumes negligence, or at least a want of sufficient caution in him who was so unfortunate as to commit it; who therefore is not altogether faultless. And as to the necessity which excuses a man who kills another *se defendendo*, Lord Bacon entitles it *necessitas culpabilis*, and thereby distinguishes it from the former necessity of killing a thief or a malefactor. For the law intends that the quarrel or assault arose from some unknown wrong, or some provocation, either in word or deed: and since in quarrels both parties may be, and usually are, in some fault; and it scarce can be tried who was originally in the wrong; the law will not hold the survivor entirely guiltless. But it is clear, in the other case, that where I kill a thief that breaks into my house, the original default can never be upon my side. The law besides may have a farther view, to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment; by ordaining, that he who slays his neighbor, without an express warrant from the law so to do, shall in no case be absolutely free from guilt.

The penalty inflicted by our laws is said by Sir Edward Coke to have been anciently no less than death; which, however, is with reason denied by later and more accurate writers. It seems rather to have consisted in a forfeiture, some say of all the goods and chattels, others of only part of them, by way of fine or *weregild*: which was probably disposed of, as in France, *in pios usus*, according to the humane superstition of the times, for the benefit of *his* soul who was thus suddenly sent to his account, with all his imperfections on his head. But that reason having long ceased, and the penalty (especially if a total forfeiture) growing

† In *Queen v. Dudley*, 14 Q. B. D. 273 (denying this *dictum* of Lord Bacon) shipwrecked seamen who killed a comrade and ate his flesh to save their own lives were held guilty of murder.

more severe than was intended, in proportion as personal property has become more considerable, the delinquent has now, and has had as early as our records will reach, a pardon and writ of restitution of his goods as a matter of course and right, only paying for suing out the same. And indeed to prevent this expense, in cases where the death has notoriously happened by misadventure or in self-defence, the judges will usually permit (if not direct) a general verdict of acquittal.⁸

III. Felonious homicide is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self or another man.

Self-murder, the pretended heroism, but real cowardice of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure, though the attempting it seems to be countenanced by the civil law, yet was punished by the Athenian law with cutting off the hand, which committed the desperate deed. And also the law of England wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self. And this admits of accessories before the fact, as well as other felonies; for if one persuades another to kill himself, and he does so, the adviser is guilty of murder. A *felo de se*, therefore, is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death: as if attempting to kill another, he runs upon his

⁸ The distinction between justifiable and excusable homicide is now of little practical importance, since, in both classes of cases, the circumstances under which the act of homicide is committed, furnish a complete defense and justification, and no penalty of any kind is incurred. Both these forms of homicide may, therefore, be included within a single class, and termed defensible, or innocent. In some of the American States, the distinction has in fact been discarded; others have retained it nominally, as a basis of classification, but there is no difference established in regard to criminal responsibility.

antagonist's sword ; or, shooting at another, the gun bursts and kills himself. The party must be of years of discretion, and in his senses, else it is no crime. But this excuse ought not to be strained to that length, to which our coroner's juries are apt to carry it, *viz.*, that the very act of suicide is an evidence of insanity ; as if every man, who acts contrary to reason, had no reason at all ; for the same argument would prove every other criminal *non compos*, as well as the self-murderer. The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong ; which is necessary, as was observed in a former chapter, to form a legal excuse. And, therefore, if a real lunatic kills himself in a lucid interval, he is a *felo de se* as much as another man.

But now the question follows, what punishment can human laws inflict on one who has withdrawn himself from their reach ? They can only act upon what he has left behind him, his reputation and fortune : on the former, by an ignominious burial in the highway, with a stake driven through his body ; on the latter, by a forfeiture of all his goods and chattels to the king ; hoping that his care for either his own reputation, or the welfare of his family, would be some motive to restrain him from so desperate and wicked an act. And it is observable, that this forfeiture has relation to the time of the act done in the felon's lifetime, which was the cause of his death. As if husband and wife be possessed jointly of a term of years in land, and the husband drowns himself ; the land shall be forfeited to the king, and the wife shall not have it by survivorship. For by the act of casting himself into the water he forfeits the term ; which gives a title to the king, prior to the wife's title by survivorship, which could not accrue till the instant of her husband's death. And though it must be owned that the letter of the law herein borders a little upon severity, yet it is some alleviation that the power of mitigation is left in the breast of the sovereign, who upon this, as on all other occasions, is reminded by the oath of his office to execute judgment in mercy.⁴

⁴ The punishment of burial in the highway, with a stake driven through the body, has been abolished. The present law provides that the remains shall be buried in the church yard or other burial ground of the parish or place where the deceased would be interred, had he not been a suicide, but without the rites of Christian burial (45 & 46 Vict. c. 19.) In the United States suicide is not a criminal offense, and there is no mode of punishment affecting either the body or the property of the deceased. (See 123 Mass. 422.) An attempt to commit suicide is, however, sometimes declared punishable. (116 N. Y. 537.)

The other species of criminal homicide is that of killing another man. But in this there are also degrees of guilt, which divide the offence into *manslaughter* and *murder*. The difference between which may be partly collected from what has been incidentally mentioned in the preceding articles, and principally consists in this, that manslaughter, when voluntary, arises from the sudden heat of the passions, murder from the wickedness of the heart.

I. Manslaughter is therefore thus defined, the unlawful killing of another without malice either express or implied ; which may be either voluntarily, upon a sudden heat ; or involuntarily, but in the commission of some unlawful act. And hence it follows, that in manslaughter there can be no accessories before the fact ; because it must be done without premeditation.

As to the first, or *voluntary* branch : if upon a sudden quarrel two persons fight and one of them kills the other, this is manslaughter : and so it is, if they upon such an occasion go out and fight in a field ; for this is one continued act of passion ; and the law pays that regard to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself ; yet neither is it murder, for there is no previous malice ; but it is manslaughter. But in this, and in every other case of homicide upon provocation, if there be a sufficient cooling-time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder. So if a man takes another in the act of adultery with his wife, and kills him directly upon the spot : though this was allowed by the laws of Solon, as likewise by the Roman civil law (if the adulterer was found in the husband's own house), and also among the ancient Goths ; yet in England it is not absolutely ranked in the class of justifiable homicide, as in the case of a forcible rape, but it is manslaughter. It is, however, the lowest degree of it ; and, therefore, in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation. Manslaughter, therefore on a sudden provocation

differs from excusable homicide *se defendendo* in this: that in one case there is an apparent necessity, for self-preservation, to kill the aggressor: in the other, no necessity at all, being only a sudden act of revenge.

The second branch, or *involuntary* manslaughter, differs also from homicide excusable by misadventure in this; that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As if two persons play at sword and buckler, unless by the king's command, and one of them kills the other: this is manslaughter, because the original act was unlawful; but it is not murder, for the one had no intent to do the other any personal mischief. So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection: as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and he calls out to all people to have a care, it is misadventure only: but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and murder, if he knows of their passing, and gives no warning at all, for then it is malice against all mankind. And, in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but, if no more was intended than a mere civil trespass, it will only amount to manslaughter.

Next as to the *punishment* of this degree of homicide: the crime of manslaughter amounts to felony, but within the benefit of clergy; and the offender shall be burnt in the hand, and forfeit all his goods and chattels. •

2. We are next to consider the crime of deliberate and wilful *murder*; a crime at which human nature starts, and which is I believe punished almost universally throughout the world with death. The words of the Mosaical law (over and above the general precept to Noah, that "whose sheddeth man's blood, by man shall his blood be shed") are very emphatical in prohibiting

the pardon of murderers. "Moreover ye shall take no satisfaction for the life of a murderer, who is guilty of death, but he shall surely be put to death; for the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it." But let us now consider the definition of this great offence.

The name of *murder* (as a crime) was anciently applied only to the secret killing of another; (which the word *moerda* signifies in the Teutonic language); and it was defined, "*homicidium quod nullo vidente, nullo sciente, clam perpetratur*:" for which the vill wherein it was committed, or (if that were too poor) the whole hundred was liable to a heavy amercement; which amercement itself was also denominated *murdrum*. This was an ancient usage among the Goths in Sweden and Denmark; who supposed the neighborhood, unless they produced the murderer, to have perpetrated or at least connived at the murder; and according to Bracton, was introduced into this kingdom by King Canute, to prevent his countrymen, the Danes, from being privily murdered by the English; and was afterwards continued by William the Conqueror, for the like security to his own Normans. And therefore if, upon inquisition had, it appeared that the person found slain was an Englishman (the presentment whereof was denominated *englescherie*), the country seems to have been excused from this burthen. But, this difference being totally abolished by statute 14 Edw. III., ch 4, we must now (as is observed by Staundforde) define murder in quite another manner, without regarding whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction.

Murder is therefore now thus defined or rather described by Sir Edward Coke; "when a person of sound memory and discretion unlawfully killeth any reasonable creature^o in being, and under the king's peace, with malice aforethought, either express or implied." The best way of examining the nature of this crime will be by considering the several branches of this definition.

First, it must be committed by a *person of sound memory and discretion*: for lunatics or infants, as was formerly observed, are incapable of committing any crime: unless in such cases where they show a consciousness of doing wrong, and of course a discretion, or discernment, between good and evil.

Next, it happens when a person of such sound discretion *un*

lawfully killeth. The unlawfulness arises from the killing without warrant or excuse: and there must also be an actual killing to constitute murder; for a bare assault, with intent to kill, is **only** a great misdemeanor, though formerly it was held to be murder. The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome. And if a person be indicted for one species of killing, as by *poisoning*, he cannot be convicted by evidence of a totally different species of death, as by *shooting* with a pistol, or *starving*. But where they only differ in circumstances, as if a *wound* be alleged to be given with a sword, and it proves to have arisen from a staff, an axe, or a hatchet, this difference is immaterial. Of all species of deaths, the most detestable is that of poison; because it can of all others be the least prevented either by manhood or forethought. And therefore by the statute 22 H. VIII., ch. 2, it was made treason, and a more grievous and lingering kind of death was inflicted on it than the common law allowed; namely, boiling to death: but this act did not live long, being repealed by 1 Edw. VI., ch. 12. There was also, by the ancient common law, one species of killing held to be murder, which may be dubious at this day; as there hath not been an instance wherein it has been held to be murder for many ages past: I mean by bearing false witness against another, with an express premeditated design to take away his life, so as the innocent person be condemned and executed. The Gothic laws punished in this case, both the judge, the witnesses, and the prosecutor. And, among the Romans, the *lex Cornelia, de sicariis*, punished the false witness with death, as being guilty of a species of assassination. And there is no doubt but this is equally murder in *foro conscientiae* as killing with a sword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their own lives) has not yet punished it as such. If a man, however, does such an act of which the probable consequence may be, and eventually is, death; such killing may be murder, although no stroke be struck by himself, and no killing be primarily intended; as was the case of the unnatural son, who exposed his sick father to the air, against his will, by reason whereof he died: of the harlot, who laid her child under leaves in an orchard, where a kite struck it and killed it; and of the parish

officers, who shifted a child from parish to parish, till it died for want of care and sustenance. So too, if a man hath a beast that is used to do mischief; and he knowing it, *suffers* it to go abroad, and it kills a man; even this is manslaughter in the owner; but if he had purposely *turned it loose*, though barely to frighten people, and make what is called sport, it is with us (as in the Jewish law) as much murder, as if he had incited a bear or dog to worry them. If a physician or surgeon gives his patient a potion or plaster to cure him, which contrary to expectation kills him, this is neither murder nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance; but it hath been holden, that if it be not a *regular* physician or surgeon, who administers the medicine or performs the operation, it is manslaughter at the least.⁵ Yet Sir Matthew Hale very justly

⁵ The present rule upon this subject has been thus declared in an English case. "There is no difference between a licensed physician or surgeon, and a person acting as physician or surgeon, without license. In either case, if a party, having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to exhibit a violent and dangerous remedy to one laboring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter." (*Rex v. Webb*, 1 M. & Rob. 405.) But in some of the States of this country a somewhat different doctrine has been established. Thus it has been held that the death of a man, killed by voluntarily following a medical prescription, cannot be adjudged felony in the party prescribing, unless he, however ignorant of medical science in general, had so much knowledge or probable information of the fatal tendency of the prescription, that it may be reasonably presumed by the jury to be the effect of obstinate, wilful rashness at the least, and not of an honest intention and expectation to cure. (*Rice v. State*, 8 Mo. 561; *State v. Schulz*, 55 Ia. 628.) But it has also been adjudged manslaughter to cause a person's death by gross recklessness of treatment, though the treatment used was without evil intent, and by such person's consent. (*Comm. v. Pierce*, 138 Mass. 165; see 38 Ark. 605.)

Interesting questions arise in regard to criminal responsibility, when two or more causes co-operate to occasion a person's death; as if a wound be given, and by improper medical treatment, or lack of attention, the injury results fatally. The rule upon this subject is well stated as follows: "If the wound was a dangerous wound, that is, calculated to endanger or destroy life, and death ensued therefrom, it is sufficient proof of the offense of murder, or manslaughter; and the person who inflicted it is responsible, though it may appear that the deceased might have recovered, if he had taken proper care of himself, or submitted to a surgical operation; or that

questions the law of this determination. In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered ; in the computation of which, the whole day upon which the hurt was done shall be reckoned the first.

Farther : the person killed must be "*a reasonable creature in being, and under the king's peace,*" at the time of the killing. Therefore to kill an alien, a Jew, or an outlaw, who are all under the king's peace and protection, is as much murder as to kill the most regular-born Englishman ; except he be an alien enemy in time of war. To kill a child in its mother's womb, is now no murder, but a great misprision : but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them. But, as there is one case where it is difficult to prove the child's being born alive, namely, in the case of the murder of bastard children by the unnatural mother, it is enacted by statute 21 Jac. I., ch. 27, that if any woman be delivered of a child which if born alive should by law be a bastard ; and endeavors privately to conceal its death, by burying the child or the like ; the mother so offending shall suffer death as in the case of murder, unless she can prove by one witness at least that the child was actually born dead. This law, which savors pretty strongly of severity, in making the concealment of the death almost conclusive evidence of the child's being murdered by the mother, is nevertheless to be also met with in the criminal codes of many other nations of Europe ; as the Danes, the Swedes, and the French. But I apprehend it has of late years been usual with us in England, upon trial for this offence, to require some sort of presumptive evidence that the child was born alive, before the other constrained presumption (that the child whose death is concealed, was therefore killed by its parent) is admitted to convict the prisoner.⁶

unskilful or improper treatment aggravated the wound, and contributed to the death, or that death was immediately caused by a surgical operation, rendered necessary by the condition of the wound." (2 Allen, 136 ; 76 Ala. 1 ; 95 Mo. 97.) But if the wound were not dangerous, and the improper treatment was the sole cause of death, the person causing the original injury would not be chargeable with the homicide. (See 39 Mich. 236 ; 78 Ky. 268.)

⁶ Infanticide, at common law, is the killing of an infant child, after it is fully born alive. If means be used to procure an abortion, and the fœtus be

Lastly, the killing must be committed *with malice aforethought*, to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing: and this malice prepense, *malitia præcogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general: the dictate of a wicked, depraved, and malignant heart; *un disposition à faire un male chose*; and it may be either *express* or *implied* in law. Express malice is when one, with a sedate deliberate mind and formed design, doth kill another: which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. This takes in the case of deliberate duelling, where both parties meet avowedly with an intent to murder: thinking it their duty as gentlemen, and claiming it as their right, to wanton with their own lives and those of their fellow creatures; without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man: and therefore the law has justly fixed the crime and punishment of murder on them, and on their seconds also. Yet it requires such a degree of passive valor to combat the dread of even undeserved contempt, arising from the false notions of honor too generally received in Europe, that the strongest prohibitions and penalties of the law will never be en-

destroyed before birth, the act is neither murder nor manslaughter by the common-law, since the person killed must be a "reasonable creature in being," and a child was not considered as "in being," until birth. This defect in the law has been generally remedied, in modern times, by statutes providing for the prevention and punishment of abortion. A child is deemed to be fully born, when every part of it is separated from the person of the mother; if its death be caused during the progress of delivery, this is not criminal homicide. It is not, however, necessary that the umbilical cord be severed, or that the full period of gestation shall have been completed. It is only requisite that death occur after actual birth. If the injuries be inflicted previously, and produce a fatal result after delivery is consummated, this will constitute infanticide.

The statute 21 Jac. 1, ch. 27, mentioned in the text, has been superseded by the act 24 & 25 Vict., ch. 100, which provides, that, "if any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavor to conceal the birth thereof, shall be guilty of a **misdeemeanor**." Similar statutes are in force in a number of the United States.

tirely effectual to eradicate this unhappy custom ; till a method be found out of compelling the original aggressor to make some other satisfaction to the affronted party, which the world shall esteem equally reputable, as that which is now given at the hazard of the life and fortune, as well of the person insulted, as of him who hath given the insult. Also, if even upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice ; that is, by an express evil design, the genuine sense of *malitia*. As when a park-keeper tied a boy, that was stealing wood, to a horse's tail, and dragged him along the park ; when a master corrected his servant with an iron bar ; and a schoolmaster stamped on his scholar's belly ; so that each of the sufferers died ; these were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act, as shows him to be an enemy to all mankind in general ; as going deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharging a gun among a multitude of people. So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not ; for this is universal malice. And, if two or more come together to do an unlawful act against the king's peace, of which the probable consequence might be bloodshed, as to beat a man, to commit a riot, or to rob a park : and one of them kills a man : it is murder in them all, because of the unlawful act, the *malitia præcogitata*, or evil intended beforehand.

Also in many cases where no malice is expressed, the law will imply it : as where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice ; for no person, unless of an abandoned heart, would be guilty of such an act, upon a slight or no apparent cause. No affront, by words or gestures only, is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another. But if the person so provoked had unfortunately killed the other, by beating him in such a manner

as showed only an intent to chastise and not to kill him, the law so far considers the provocation of contumelious behavior, as to adjudge it only manslaughter, and not murder. In like manner if one kills an officer of justice, either civil or criminal, in the execution of his duty, or any of his assistants endeavoring to conserve the peace, or any private person endeavoring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the killer shall be guilty of murder. And if one intends to do another felony, and undesignedly kill a man, this is also murder. Thus if one shoots at A. and misses *him*, but kills B., this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A.; and B., against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder. So also if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it. It were endless to go through all the cases of homicide, which have been adjudged either expressly, or impliedly malicious: these therefore may suffice as a specimen; and we may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where *justified* by the command or commission of the law; *excused* on the account of accident or self-preservation; or *alleviated* into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate guilt. For all homicide is presumed to be malicious, until the contrary appeareth upon evidence.⁷

⁷ The subject of homicide may be said to be invariably, in this country, a matter of statutory definition and regulation. The principles and distinctions of the common-law have been in diverse ways and degrees changed, modified, extended, or discarded. Very essential alterations, however, have rarely been made, except in regard to the classification of different modes of homicide, and the punishments prescribed therefor; and it is a general

The punishment of murder, and that of manslaughter was formerly one and the same ; both having the benefit of clergy ; so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime. But now by several statutes, the benefit of clergy is taken away from murderers through malice prepense, their abettors, procurers, and counsellors.⁸

By the Roman law, *parricide*, or the murder of one's parents or children, was punished in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leathern sack, with a live dog, a cock, a viper and an ape, and so cast into the sea. Solon, it is true, in his laws, made none against parricide ; apprehending it impossible that any one should be guilty of so unnatural a barbarity. And the Persians, according to Herodotus, entertained the same notion, when they adjudged all persons who killed their reputed parents to be bastards. And, upon some such reason as this, we must account for the omission of an exemplary punishment for this crime in our English laws ; which treat it no otherwise than as

rule, that such acts of homicide as would have been deemed innocent and defensible at common law, are so at present, while those which were criminal are still criminal. But it is in reference to murder and manslaughter that the changes by legislation have been most important and diverse. The line of demarcation between these two grades of felonious homicide has been in some States differently drawn than at common law, and, moreover, in a number of the States, murder and manslaughter are respectively distinguished as of different degrees. Thus, murder in the first degree would be the most heinous kind of felonious homicide, and would entail the severest punishment, while the second and other degrees would be of an inferior grade. It is evident that this discrimination into degrees has led to the introduction into the law of principles and rules of distinction which were not applied at common-law. It would not be practicable to give any statement of such distinctions, since there is so much diversity in the legislation of different States, and the statute-books of each State must be consulted. In some States, it has been made one distinguishing test of murder in the highest degree, that the act of homicide was committed with an actual intent to kill, and the phrase "intent to kill" has a different extent of meaning from the term "malice aforethought" of the common-law. (See *Shufflin v. People*, 62 N. Y. 229.)

⁸ The punishment for murder, by the present English law, is the death penalty ; that of manslaughter is penal servitude, or imprisonment for various terms, or pecuniary fine. In the United States, it is the general rule that similar punishments (penal servitude excepted) are inflicted. But some States have abolished the death penalty.

simple murder, unless the child was also the servant of his parent.

For, though the breach of natural relation is unobserved, yet the breach of civil or ecclesiastical connections, when coupled with murder, denominates it a new offence, no less than a species of treason, called *parva proditio*, or *petit treason*: which however is nothing else but an aggravated degree of murder; although on account of the violation of private allegiance, it is stigmatized as an inferior species of treason. And thus, in the ancient Gothic constitution, we find the breach both of natural and civil relations ranked in the same class with crimes against the State and the sovereign.

Petit treason, according to the statute 25 Edw. III., ch. 2, may happen three ways: by a servant killing his master, a wife her husband, or an ecclesiastical person (either secular or regular) his superior, to whom he owes faith and obedience.⁹ But a person indicted of petit treason may be acquitted thereof, and found guilty of manslaughter or murder: and in such case it should seem that *two* witnesses are not necessary, as in case of petit treason they are.

CHAPTER XIII.

[BL. COMM.—BOOK IV. CH. XV.]

Of Offences against the Persons of Individuals.

HAVING in the preceding chapter considered the principal crime, or public wrong, that can be committed against a private subject, namely, by destroying his life; I proceed now to inquire into such other crimes and misdemeanors, as more peculiarly affect the security of his person, while living.

Of these some are felonies, and in their nature capital; others are simple misdemeanors, and punishable with a lighter animadversion. Of the felonies, the first is that of *mayhem*.

⁹ The crime of petit treason has been abolished in England, and is unknown in the law of the United States.

I. Mayhem, *mayhemium*, was in part considered in the preceding book, as a civil injury: but it is also looked upon in a criminal light by the law, being an atrocious breach of the king's peace, and an offence tending to deprive him of the aid and assistance of his subjects. For mayhem is properly defined to be, as we may remember, the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself, or to annoy his adversary. And therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which in all animals abates their courage, are held to be mayhems. But the cutting off his ear, or nose, or the like, are not held to be mayhems at common law; because they do not weaken but only disfigure him.

By the ancient law of England he that maimed any man, whereby he lost any part of his body, was sentenced to lose the like part; *membrum pro membro*. But this went afterwards out of use: partly because the law of retaliation, as was formerly shown, is at best an inadequate rule of punishment; and partly because upon a repetition of the offence the punishment could not be repeated. So that, by the common law, as it for a long time stood, mayhem was only punishable with fine and imprisonment; unless perhaps the offence of mayhem by castration, which all our old writers held to be felony: "*et sequitur aliquando poena capitalis, aliquando perpetuum exilium, cum omnium bonorum ademptione.*" And this, although the mayhem was committed upon the highest provocation.

But subsequent statutes have put the crime and punishment of mayhem more out of doubt. The last statute, but by far the most severe and effectual of all, is that of 22 & 23 Car. II., ch. 1, called the Coventry act; being occasioned by an assault on Sir John Coventry in the street, and slitting his nose, in revenge (as was supposed) for some obnoxious words uttered by him in parliament. By this statute it is enacted, that if any person shall of malice aforethought, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any other person, *with intent to maim or disfigure him*; such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy.¹

¹ The statute at present in force in regard to this offense, is the 24 & 25

II. The second offence, more immediately affecting the personal security of individuals, relates to the female part of His Majesty's subjects; being that of their *forcible abduction and marriage*; which is vulgarly called *stealing an heiress*. For by statute 3 Hen. VII., ch. 2, it is enacted, that if any person shall for lucre take any woman, being maid, widow, or wife, and having substance either in goods or lands, being heir apparent to her ancestors, contrary to her will; and afterwards she be married to such misdoer, or by his consent to another, or defiled; such person, his procurers and abettors, and such as knowingly receive such woman, shall be deemed principal felons; and by statute 30 Eliz., ch. 9, the benefit of clergy is taken away from all such felons, who shall be principals, procurers, or accessories *before* the fact.

An inferior degree of the same kind of offence, but not attended with force, is punished by the statutes 4 & 5 Ph. & Mar. ch. 8, which enacts that if any person, above the age of fourteen, unlawfully shall convey or *take away any woman child unmarried* (which is held to extend to bastards as well as to legitimate children), within the age of sixteen years, from the possession and against the will of the father, mother, guardians, or governors, he shall be imprisoned two years, or fined at the discretion of the justices; and if he deflowers such maid or woman child, or without the consent of parents, contracts matrimony with her, *he* shall be imprisoned five years, or fined at the discretion of the justices, and *she* shall forfeit all her lands to her next of kin, during the life of her said husband.²

III. A third offence, against the female part also of His Majesty's subjects, but attended with greater aggravation than that of forcible marriage, is the crime of *rape, raptus mulierum*, or the carnal knowledge of a woman forcibly and against her will.

Vict., ch. 100, which includes many other forms of personal injury than such as would have been deemed distinctively acts of mayhem at common law. In this country, also, statutes have been passed in a number of the States, declaring it mayhem, not only to injure a limb used in fighting, but to cause personal disfigurement in various ways. (See *ante*, p. 677, note 4.)

² These early statutes have been superseded by recent legislation; but no very material changes have been made in the provisions relating to this offense, except to alter the punishment. It is generally provided, by statute in this country, that the abduction of females for purposes of prostitution, concubinage, or marriage, shall be a crime, punishable with severe penalties.

A male infant, under the age of fourteen years, is presumed by law incapable to commit a rape, and therefore it seems cannot be found guilty of it. For though in other felonies *malitia supplet ætatem*, as has in some cases been shown; yet, as to this particular species of felony, the law supposes an imbecility of body as well as mind.³

The civil law seems to suppose a prostitute or common harlot incapable of injuries of this kind; not allowing any punishment for violating the chastity of her, who hath indeed no chastity at all, or at least hath no regard to it. But the law of England does not judge so hardly of offenders, as to cut off all opportunity of retreat even from common strumpets, and to treat them as never capable of amendment. It therefore holds it to be felony to force even a concubine or harlot; because the woman may have forsaken that unlawful course of life.

As to the material facts requisite to be given in evidence and proved upon an indictment of rape, they are of such a nature, that though necessary to be known and settled, for the conviction of the guilty and preservation of the innocent, and therefore to be found in such criminal treatises as discourse of these matters in detail, yet they are highly improper to be publicly discussed, except only in a court of justice.⁴ I shall therefore merely add upon this head a few remarks from Sir Matthew Hale, with regard to the competency and credibility of witnesses; which may, *salvo pudore*, be considered.

And, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance: if the witness be of good fame;

³ But it has been held in this country that a boy under fourteen years of age may be convicted of rape, if proved to have arrived at puberty. But there must be clear proof of capacity by affirmative evidence. (*People v. Randolph*, 2 Parker, 174; *Williams v. State*, 14 Ohio, 222.)

⁴ If the woman consent to the criminal connection, whether the consent be voluntary or obtained by fraudulent artifices, there is no rape committed. Thus it has been held that if the ravisher personates her husband, and consent is given under that supposition, he is not chargeable with this crime. Some recent decisions and statutes, however, are to the contrary. (*Queen v. Barrow*, L. R. 1 C. C. 156; see 15 Cox, C. C. 579; 32 N. Y. 525; 50 Barb. 128 & 144; 94 Ind. 96; 22 Tex. App. 650; 48 & 49 Vict. c. 69.)

it she presently discovered the offence, and made search for the offender ; if the party accused fled for it ; these and the like are concurring circumstances which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stands unsupported by others ; if she concealed the injury for any considerable time after she had opportunity to complain ; if the place, where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry ; these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned.

Moreover, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she hath sense and understanding to know the nature and obligations of an oath ; or even to be sensible of the wickedness of telling a deliberate lie. Nay, though she hath not, it is thought by Sir Matthew Hale that she ought to be heard without oath, to give the court information ; and others have held, that what the child told her mother, or other relations, may be given in evidence, since the nature of the case admits frequently of no better proof. But it is now settled (*Brazier's case*, before the twelve judges P. 19 Geo. III.) that no hearsay evidence can be given of the declaration of a child who hath not capacity to be sworn, nor can such a child be examined in court without oath ; and that there is no determinate age, at which the oath of a child ought either to be admitted or rejected. Yet, where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact ; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. There may be therefore, in many cases of this nature, witnesses who are competent, that is, who may be admitted to be heard ; and yet after being heard, may prove not to be credible, or such as the jury is bound to believe. For one excellence of the trial by jury is, that the jury are triers of the credit of the witnesses, as well as of the truth of the fact.

"It is true," says this learned judge, "that rape is a most detestable crime, and therefore ought severely and impartially to be punished with death ; but it must be remembered that it is an

accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent." He then relates two very extraordinary cases of malicious prosecution for this crime, that had happened within his own observation ; and concludes thus : " I mention these instances, that we may be the more cautious upon trials of offences of this nature, wherein the court and jury may with so much ease be imposed upon, without great care and vigilance ; the heinousness of the offence many times transporting the judge and jury with so much indignation that they are overhastily carried on to the conviction of the person accused thereof, by the confident testimony of sometimes false and malicious witnesses."

IV. What has been here observed, especially with regard to the manner of proof, which ought to be more clear in proportion as the crime is the more detestable, may be applied to another offence, of a still deeper malignity ; the infamous *crime against nature*, committed either with man or beast. A crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out : for, if false, it deserves a punishment inferior only to that of the crime itself.

I will not act so disagreeable a part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in its very indictments, as a crime not fit to be named : "*peccatum illud horribile, inter christianos non nominandum.*"

These are all the felonious offences more immediately against the personal security of the subject. The inferior offences of misdemeanors, that fall under this head, are *assaults, batteries, wounding, false imprisonment*,⁵ and *kidnapping*.

V., VI., VII. With regard to the nature of the three first of these offences in general, I have nothing further to add to what has already been observed in the preceding book of these commentaries ; when we considered them as private wrongs, or civil injuries, for which a satisfaction or remedy is given to the party

⁵ As to these offences, see *ante*, pages 674, 675, 686.

aggrieved. But, taken in a public light as a breach of the king's peace, an affront to his government, and a damage done to his subjects, they are also indictable and punishable with fines and imprisonment; or with other ignominious corporal penalties, where they are committed with any very atrocious design. As in case of an assault with an intent to murder, or with an intent to commit either of the crimes last spoken of; for which intentional assaults, in the two last cases, indictments are much more usual than for the absolute perpetration of the facts themselves, on account of the difficulty of proof; or, when both parties are consenting to an unnatural attempt, it is usual not to charge any *assault*; but that one of them laid hands on the other with intent to commit, and that the other permitted the same with intent to suffer, the commission of the abominable crime before mentioned.

VIII. The two remaining crimes and offences, against the persons of His Majesty's subjects, are infringements of their natural liberty: concerning the first of which, *false imprisonment*, its nature and incidents, I must content myself with referring the student to what was observed in the preceding book, when we considered it as a mere civil injury. But besides the private satisfaction given to the individual by action, the law also demands public vengeance for the breach of the king's peace, for the loss which the state sustains by the confinement of one of its members, and for the infringement of the good order of society. And indeed there can be no doubt, but that all kinds of crimes of a public nature, all disturbances of the peace, all oppressions, and other misdemeanors whatsoever of a notoriously evil example, may be indicted at the suit of the king.

IX. The other remaining offence, that of *kidnapping*, being the forcible abduction or stealing away of a man, woman, or child, from their own country, and sending them into another, was capital by the Jewish law. "He that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death." So likewise in the civil law, the offence of spiriting away and stealing men and children; which was called *plagium*, and the offenders *plagiarii*, was punished with death. This is unquestionably a very heinous crime, as it robs the king of his subjects, banishes a man from his country, and may in its consequences be productive of the most cruel and disagreeable hard-

ships; and therefore the common law of England has punished it with fine, imprisonment, and pillory.⁶

CHAPTER XIV.

[BL. COMM.—BOOK IV. CH. XVI.]

Of Offences against the Habitations of Individuals.

THE only two offences, that more immediately affect the *habitations* of individuals or private subjects, are those of *arson* and *burglary*.

I. Arson, *ab ardendo*, is the malicious and wilful burning the house or out-house of another man. This is an offence of very great malignity and much more pernicious to the public than simple theft: because first, it is an offence against that right of habitation, which is acquired by the law of nature as well as by the laws of society; next, because of the terror and confusion that necessarily attend it: and, lastly, because in simple theft the thing stolen only changes its master but still remains in *esse* for the benefit of the public, whereas by burning the very substance is absolutely destroyed. It is also frequently more destructive than murder itself, of which too it is often the cause: since murder, atrocious as it is, seldom extends beyond the felonious act designed; whereas fire too frequently involves in the common calamity persons unknown to the incendiary, and not intended to be hurt by him, and friends as well as enemies. For which reason the civil law punishes with death such as maliciously set fire to houses in towns, and contiguous to others; but is more merciful to such as only fire a cottage, or house, standing by itself.

⁶ The term "kidnapping" is generally employed in ordinary usage with reference to the abduction of children, but in law it is applicable to all persons. This crime is usually defined by statute at the present day, and the sending of the person taken into another country is not usually made an essential element in the offense. Fraudulently enticing, inveigling, or decoying a person away, with intent to imprison, or conceal him, or detain him from home, are commonly declared to be kidnapping, as well as a forcible seizure and detention. There are generally special statutory provisions in regard to the abduction of children. (See 25 N. Y. 373; 109 N. Y. 226.)

Our English law also distinguishes with much accuracy upon this crime. And therefore we will inquire, first, what is such a house as may be the subject of this offence ; next, wherein the offence itself consists ; or what amounts to a burning of such house ; and lastly, how the offence is punished.

1. Not only the bare dwelling-house, but all out-houses that are parcel thereof, though not contiguous thereto, nor under the same roof, as barns and stables, may be the subject of arson. And this by the common law : which also accounted it felony to burn a single barn in the field, if filled with hay or corn, though not parcel of the dwelling-house. The burning of a stack of corn was anciently likewise accounted arson. And indeed all the niceties and distinctions which we meet with in our books, concerning what shall, or shall not, amount to arson, seem now to be taken away by a variety of statutes ; which have made the punishment of wilful burning equally extensive as the mischief. The offence of arson (strictly so called) may be committed by wilfully setting fire to one's own house, provided one's neighbor's house is thereby also burnt ; but if no mischief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's. For by the common law no intention to commit a felony amounts to the same crime ; though it does, in some cases, by particular statutes. However such wilful firing one's own house, *in a town*, is a high misdemeanor, and punishable by fine, imprisonment, pillory, and perpetual sureties for the good behavior. And if a landlord or reversioner sets fire to his own house, of which another is in possession under a lease from himself, or from those whose estate he hath, it shall be accounted arson ; for during the lease the house is the property of the tenant.¹

2. As to what shall be said to be a *burning*, so as to amount

¹ The crime of arson has been much extended in scope by legislation, both in England and in this country, and now includes, in many States, not only the burning of a dwelling-house or outhouses connected therewith, but also of buildings of various kinds, such as stores, warehouses, churches, mills, public buildings, etc. The burning of vessels, of stacks of grain or hay, of valuable crops, of bridges, etc., is also frequently declared to be arson. It is usual, moreover, to provide by statute that burning one's own house shall constitute this offense. In some States, arson is divided into degrees ; thus in New York there are three degrees of this offense, particular penalties being prescribed for each degree. (Penal Code. §§ 486-495.) (See 80 N. Y. 327 ; 54 Vt. 83 ; 48 Mich. 31 ; 131 Mass. 421.)

to arson, a bare intent, or attempt to do it, by actually setting fire to a house, unless it absolutely *burns*, does not fall within the description of *incendit et combussit*; which were words necessary, in the days of law-Latin to all indictments of this sort. But the burning and consuming of any part is sufficient; though the fire be afterwards extinguished. Also it must be a *malicious* burning; otherwise it is only a trespass: and therefore no negligence or mischance amounts to it.² For which reason, though an unqualified person, by shooting with a gun, happens to set fire to the thatch of a house, this Sir Matthew Hale determines not to be felony, contrary to the opinion of former writers.

3. The *punishment* of arson was death by our ancient Saxon laws; and now the punishment of all capital felonies is uniform, namely, by hanging.³

II. Burglary, or nocturnal housebreaking, *burgi latrocinium*, which by our ancient law was called *hamesecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offence; not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation which every individual might acquire even in a state of nature; an invasion, which in such a state would be sure to be punished with death, unless the assailant were the stronger. But in civil society, the laws also come into the assistance of the weaker party; and, besides that they leave him this natural right of killing the aggressor, if he can (as was shown in a former chapter), they also protect and avenge him, in case the might of the assailant is too powerful. And the law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity. For this reason no outward doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private.

² The term "malice" is used in this connection in its legal signification, as denoting that evil and mischievous intention, however general, from which proceeds wrongful acts, done without just cause or excuse. No particular malevolence against the person injured is necessary.

³ Arson is no longer punished capitally in England; but the usual penalties are penal servitude, and imprisonment for various terms. In this country, imprisonment in state prison is the common punishment.

The definition of a burglar, as given us by Sir Edward Coke, is "he that by night breaketh and entereth into a mansion-house, with intent to commit a felony." In this definition there are four things to be considered; the *time*, the *place*, the *manner*, and the *intent*.

1. The *time* must be by night, and not by day: for in the day time there is no burglary. We have seen, in the case of justifiable homicide, how much more heinous all laws made an attack by night, rather than by day; allowing the party attacked by night to kill the assailant with impunity. As to what is reckoned night, and what day, for this purpose: anciently the day was accounted to begin only at sun-rising, and to end immediately upon sun-set; but the better opinion seems to be, that if there be daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it is no burglary. But this does not extend to moonlight: for then many midnight burglaries would go unpunished: and besides, the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night; when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless.

2. As to the *place*. It must be, according to Sir Edward Coke's definition, in a *mansion-house*: and therefore to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes that it is *domus mansionalis Dei*. But it does not seem absolutely necessary that it should in all cases be a mansion-house; for it may also be committed by breaking the gates or walls of a *town* in the night; though that perhaps Sir Edward Coke would have called the mansion-house of the garrison or corporation. Spelman defines burglary to be, "*nocturna diruptio alicujus habitaculi, vel ecclesiæ, etiam murorum portarumve burgi, ad feloniam perpetranda.*" And therefore we may safely conclude, that the requisite of its being *domus mansionalis* is only in the burglary of a private house: which is the most frequent, and in which it is indispensably necessary to form its guilt, that it must be in a mansion or dwelling-house. For no distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle of defence: nor is a breaking open of houses wherein no man resides, and which therefore for the time being are not mansion-houses, attended

with the same circumstances of midnight terror. A house, however, wherein a man sometimes resides, and which the owner hath only left for a short season, *animo revertendi*, is the object of burglary, though no one be in it the time of the fact committed. And if the barn, stable, or warehouse, be parcel of the mansion house and, within the same common fence, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or homestall. A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is, to all other purposes as well as this, the mansion-house of the owner.* So also is a room or lodging, in any private house, the mansion for the time being of the lodger; if the owner doth not himself dwell in the house, or if he and the lodger enter by different outward doors. But if the owner himself lies in the house, and hath but one outward door at which he and his lodgers enter, such lodgers seem only to be inmates, and all their apartments to be parcel of the one dwelling-house of the owner. Thus too the house of a corporation, inhabited in separate apartments by the officers of the body corporate, is the mansion-house of the corporation, and not of the respective officers. But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there; it is no dwelling-house, nor can burglary be committed therein; for by the lease it is severed from the rest of the house, and therefore is not the dwelling-house of him who occupies the other part: neither can I be said to dwell therein, when I never lie there. Neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge therein; for the law regards thus highly nothing but permanent edifices; a house

* Thus, a tenement-house may be severed, by lease to different tenants, into distinct habitations, and each separate room, or suite of rooms, will be a dwelling-house, and to break and enter it will be burglary, as to the tenant therein residing. (*Mason v. People*, 26 N. Y. 200; *People v. Bush*, 3 Parker, 552.) But a guest's chamber in an inn is not his dwelling-house. (86 N. Y. 360.)

It is now provided by statute in England, that no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of it for the purpose of burglary, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage, leading from one to the other. (24 & 25 Vict. ch. 96.) Similar statutes have been passed in a number of the American States.

or church, the wall or gate of a town ; and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, that it would be to uncover a tilted wagon in the same circumstances.

3. As to the *manner* of committing burglary : there must be both a breaking and an entry to complete it.⁶ But they need not be both done at once : for if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars. There must in general be an actual breaking ; not a mere legal *clausum fregit* (by leaping over invisible ideal boundaries, which may constitute a civil trespass), but a substantial and forcible irruption. As at least by breaking, or taking out the glass of, or otherwise opening, a window : picking a lock, or opening it with a key ; nay, by lifting up the latch of a door, or unloosing any other fastening which the owner has provided. But if a person leaves his doors or windows open, it is his own folly and negligence, and if a man enters therein, it is no burglary : yet, if he afterwards unlocks an inner or chamber door, it is so. But to come down a chimney is held a burglarious entry ; for that is as much closed as the nature of things will permit. So also to knock at the door, and upon opening it to rush in, with a

⁶ The breaking is said to be *actual*, when effected directly by the exercise of physical force ; *constructive*, when an entrance is obtained by threats, fraud, or conspiracy. Lifting the latch of an outer door is a sufficient actual breaking (*People v. Bush*, 3 Parker, 552), or to tear down a netting fastened to the outside of a window. (*Comm. v. Stephenson*, 8 Pick. 354.) But if an opening be left by the negligence or imprudence of the house-owner, it will not be a breaking to enlarge it ; as, to push higher a window sash which has been left slightly raised. (*Comm. v. Strupney*, 105 Mass. 588.) This differs from the case of entrance by a chimney, since a chimney is necessary in every house, and it is not practicable to close it. Though this aperture be left open, the house is as much closed as the nature of things will permit. Forcing open an inner door is a sufficient breaking, although the first entrance was through an open outer door or other aperture ; but not to break open boxes, trunks, or chests. Sufficient instances of constructive breaking are referred to in the text. (See *Nicholls v. State*, 68 Wis. 416 ; 85 Pa. St. 54.)

In order to constitute a sufficient *entry*, it is necessary that some part of the person should pass within the house, or some instrument or weapon with which it is intended to commit the felony designed. The insertion of a hand, foot, or finger, will be sufficient. But it is not a burglarious entry to introduce merely the instrument used to effect an entrance ; as an auger, or crow-bar.

felonious intent: or under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search for traitors, and then to bind the constable and rob the house; all these entries have been adjudged burglarious, though there was no actual breaking; for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process. And so, if a servant opens and enters his master's chamber-door with a felonious design; or if any other person lodging in the same house or in a public inn, opens and enters another's door, with such evil intent, it is burglary. Nay, if the servant conspires with a robber and lets him into the house by night, this is burglary in both; for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease, rather aggravates than extenuates the guilt. As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand, is sufficient; as to step over the threshold, to put a hand or hook in at a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries. The entry may be before the breaking, as well as after: for by statute 12 Ann., ch. 7, if a person enters into the dwelling-house of another, without breaking in, either by day or by night, with intent to commit felony, or being in such a house, shall commit any felony; and shall in the night break out of the same, this is declared to be burglary; there having before been different opinions concerning it:⁶ Lord Bacon holding the affirmative, and Sir Mathew Hale the negative. But it is universally agreed, that there must be both a breaking, either in fact or by implication, and also an entry, in order to complete the burglary.

4. As to the *intent*; it is clear, that such breaking and entry must be with a felonious intent, otherwise it is only a trespass. And it is the same, whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is

⁶ Statutes, similar to the 12 Anne, ch. 7, providing that it shall be a sufficient breaking, to break *out* of a house as well as to break *in*, have been enacted in a number of the American States. This statute has been substantially redeclared by the act 24 & 25 Vict., ch. 96.

burglary; whether the thing be actually perpetrated or not. Nor does it make any difference, whether the offense were felony at common law, or only created so by statute; since that statute which makes an offense felony, gives it incidentally all the properties of a felony at common law.⁷

Thus much for the nature of burglary; which is a felony at common law, but within the benefit of clergy.

CHAPTER XV.

[BL. COMM.—BOOK IV. CH. XVII.]

Of Offences against private property.

THE next and last species of offences against private subjects, are such as more immediately affect their property. Of which there are two, which are attended with a breach of the peace; *larceny*, and *malicious mischief*: and one, that is equally injurious to the rights of property, but attended with no act of violence; which is the crime of *forgery*. Of these three in their order.

I. Larceny, or *theft*, by contraction for latrocinny, *latrocinium*, is distinguished by the law into two sorts; the one called *simple* larceny, or plain theft unaccompanied with any other atrocious circumstance; and *mixed* or *compound* larceny, which also includes in it the aggravation of a taking from one's house or person.

And, first, of *simple* larceny; which, when it is the stealing of goods above the value of twelve-pence, is called *grand* larceny; when of goods to that value, or under, is *petit* larceny; offences which are considerably distinguished in their punishment, but not otherwise.¹ I shall therefore first consider the

⁷ These rules of the common-law, in regard to the crime of burglary, have been modified by legislation, both in England and in this country. The breaking and entering of other buildings than dwelling-houses, have been included within this offense; so to enter by day as well as by night; and, in a number of the States, burglary has been divided into degrees, to which different penalties are attached. The statutes of each State must be consulted upon this subject. (See 69 Wis. 203; 45 N. J. L. 340; 108 N. Y. 137; 37 O. St. 108.)

¹ The distinction between grand and petit larceny has been abolished in

nature of simple larceny in general ; and then shall observe the different degrees of punishment inflicted on its two several branches.

Simple larceny then is "the felonious taking, and carrying away, of the personal goods of another." This offence certainly commenced then, whenever it was, that the bounds of property, or laws of *meum* and *tuum*, were established. How far such an offence can exist in a state of nature, where all things are held to be common, is a question that may be solved with very little difficulty. The disturbance of any individual, in the occupation of what he has seized to his present use, seems to be the only offence of this kind incident to such a state. But unquestionably, in social communities, when property is established, the necessity whereof we have formerly seen, any violation of that property is subject to be punished by the laws of society : though how far that punishment shall extend, is matter of considerable doubt. At present we will examine the nature of theft, or larceny, as laid down in the foregoing definition.

1. It must be a *taking*.² This implies the consent of the England by statute, and in many of the States of this country. But, in some States, it is still retained, though the sum of money upon which the distinction rests has been changed. Thus, in New York, the distinction is still preserved, though founded on a different basis, and grand larceny is furthermore divided into two degrees.

² In order to constitute larceny, an act of *trespass* must be involved in the theft. Trespass, as here used, denotes an injury to, or violation of, a person's title and possessory interest in chattels, and consists in wrongfully depriving him of possession against his will. (*People v. McDonald*, 43 N. Y. 61.) Hence, larceny may be committed by taking goods, either from the general owner having absolute title, or from one having a special ownership temporarily, as a bailee ; and the goods may be described in the indictment as the property, either of the general, or of the qualified owner. A finder of chattels has a special right of ownership, as against all persons but the true owner ; and the theft of them by a third person would constitute larceny as against him, notwithstanding the defeasible nature of his interest. (See also *Ward v. People*, 3 Hill, 395 ; 6 Id. 144.) A general owner may even be chargeable with larceny, if he takes the goods from one having the right of temporary ownership and possession, with intent to charge him with their value. (45 N. Y. L. 448 ; 50 Mich. 249 ; 10 Wend. 165.) But goods in the possession of a servant are deemed to be constructively in the possession of the master, and larceny of them is committed against the master, and not against the servant.

As larceny involves an act of trespass, it cannot be committed by one having a right of property and of immediate possession in the goods taken. If a bailee wrongfully appropriates to his own use the property entrusted

owner to be wanting. Therefore no delivery of the goods from the owner to the offender, upon trust, can ground a larceny. As if A. lends B. a horse, and he rides away with him: or, if I to him, during the continuance of the bailment, he is not guilty of larceny; the property was acquired rightfully, without trespass, and the subsequent conversion amounts only to a breach of trust. But if the act be done after the bailment has terminated, it will constitute larceny; and the termination of the bailment may result not only from the expiration of the term for which the trust was to continue, but also from some wrongful act of interference with the goods by the bailee, in violation of his trust. If, for example, a carrier of goods "breaks bulk," as it is termed, by wrongfully opening a box, or bale, or package, his special right of ownership ceases, and he will be guilty of larceny, if he abstracts a part of the contents. (*Nichols v. People*, 17 N. Y. 114; *Rex v. Pratley*, 5 C. & P. 533.) This doctrine leads to the peculiar result that if a bailee takes the entire package committed to his custody, he commits no crime, but only a breach of trust; while, if he breaks it open and takes a portion of the contents, he perpetrates larceny. This is a logical conclusion from the rule that an act of trespass must be involved in larceny, but is manifestly unreasonable on practical grounds; and it is, therefore, frequently provided by statute, that every wrongful conversion of goods by carriers, shall constitute larceny or embezzlement.

Since goods in the custody of a servant are deemed to be constructively in the master's possession, it will be an act of trespass for him to appropriate to himself the goods which he has received from the master, and he will therefore be chargeable with larceny for such an act, done with intent to steal. (See *People v. McDonald*, 43 N. Y. 61; *Comm. v. King*, 9 Cush. 284.) But if goods were received by the servant from some third person for delivery to the master, and he appropriated them to himself before such delivery were made, this would not be an act of larceny; no trespass would be committed against the master, since he never had possession. But the rule would be otherwise, if the wrongful conversion occurred after delivery; and the delivery is deemed to be complete when the property has reached its "ultimate destination," as it is termed, by being placed either actually or constructively within the master's control and possession. This rule leads to subtle distinctions. Thus, it is held a sufficient delivery if a clerk deposits money, received from a customer, in a money-drawer; or if a servant receives coal, which his master has purchased, into his master's cart to be carried home. (*Rex v. Hammon*, 4 Taunton, 304; *Rex v. Robinson*, 2 East, P. C. 565; *People v. McDonald*, 43 N. Y. 61.) After such complete delivery, a wrongful conversion with felonious intent constitutes larceny, by the common-law; before, only a breach of trust. But, in modern times, this defect in the common-law has been remedied by legislation, declaring such breaches of trust to be a criminal offense, which has received the name of *embezzlement*. (See as to this crime, note 10, *post*.)

Finders of lost goods have no right to detain them from the true owner, if he is known; and if they appropriate them to their own use, when they know to whom the property belongs, or have reasonable means of ascertain-

send goods by a carrier, and he carries them away ; these are no larcenies. But if the carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, these are larcenies ; for here the *animus furandi* is manifest ; since in the first case he had otherwise no inducement to open the goods, and in the second the trust was determined, the delivery having taken its effect. But bare non-delivery shall not of course be intended to arise from a felonious design ; since that may happen from a variety of other accidents. Neither by the common law was it larceny in any servant to run away with the goods committed to him to keep, but only a breach of civil trust. But by statute 33 Hen. VI., ch. 1, the servants of persons deceased, accused of embezzling their masters' goods, may by writ out of chancery (issued by the advice of the chief justices and

ing by marks upon the goods or otherwise, who is the true owner, they are guilty of larceny. (*People v. Anderson*, 14 Johns. 294 ; *Comm. v. Titus*, 116 Mass. 42 ; *Ransom v. State*, 22 Ct. 153.) But when there is no reasonable means of discovering the owner, the finder may appropriate the property at once, without committing larceny. (*Queen v. Glyde*, L. R. 1 C. C. 139.) And in any case of finding, the felonious intent must exist at the time of the taking, in order that larceny may be committed ; it is not sufficient if the intent is entertained and effectuated afterwards. (*Wilson v. People*, 39 N. Y. 459 ; *Hill v. State*, 57 Wis. 377 ; *Queen v. Flowers*, 16 Q. B. D. 643.)

It is a fundamental rule, that larceny must be committed against the will of the owner of the property. If he voluntarily consent to the taking, the act is justified by his license. But if the consent be obtained by fraud or artifice, the taking will, in some cases, constitute larceny. Thus, if the owner be induced, by trick or artifice, to part with the goods, but does so with the intent merely to part with the custody and possession of them for a limited period, and not with his title and *right of property*, the person who fraudulently obtains possession and appropriates the property to his own use, is guilty of larceny. But if the owner intend to part with his *right of property* in the goods, the offense is that of obtaining goods by *false pretences*, and not larceny. Thus, if one hires or borrows a chattel, with intent to steal, the taking is larceny ; so if one, fraudulently and with intent to steal, obtains property with the ostensible purpose, and upon the understanding that he will convey and deliver it to a particular person. (*Smith v. People*, 53 N. Y. 111 ; *Hildebrand v. People*, 56 N. Y. 394 ; *Queen v. McKale*, L. R. 1 C. C. 125 ; see 20 Q. B. D. 182 ; 5 Gray, 83.) But if a sale of goods were effected through fraudulent representations, and the goods were delivered to the purchaser, it would be a case of false pretences and not of larceny, since the vendor intended to part with the property. (See *People v. Johnson*, 12 Johns. 292 ; *Thorne v. Turck*, 94 N. Y. 90.) In New York, however, these distinctions are now abolished, and the obtaining of goods by false pretences is declared larceny. (Penal Code, § 528 ; and see *People v. Richmond*, 57 Mich. 403.)

chief baron, or any two of them), and proclamation made thereupon, be summoned to appear personally in the court of king's bench, to answer their masters' executors in any civil suit for such goods; and shall, on default of appearance, be attainted of felony. And by statute 21 Hen. VIII., ch. 7, if any servant embezzles his master's goods to the value of forty shillings, it is made felony; except in apprentices, and servants under eighteen years old.⁸ But if he had not the possession, but only the care and oversight of the goods, as the butler of the plate, the shepherd of the sheep, and the like, the embezzling of them is felony at common law. So if a guest robs his inn or tavern of a piece of plate, it is larceny: for he hath not the possession delivered to him, but merely the use, and so it is declared to be by statute 3 & 4 Wm. & M., ch. 9, if a lodger runs away with the goods from his ready furnished lodgings. Under some circumstances also a man may be guilty of felony in taking his own goods: as if he steals them from a pawnbroker, or any one to whom he hath delivered and entrusted them, with intent to charge such bailee with the value; or if he robs his own messenger on the road, with an intent to charge the hundred with the loss according to the statute of Winchester.

2. There must not only be a taking, but a *carrying away*;⁴ *cepit et asportavit* was the old law-Latin. A bare removal from the place in which he found the goods, though the thief does not

⁸ These statutes have been superseded by later enactments. See, as to the present law of embezzlement, note 10, *post*.

⁴ It is a sufficient asportation, if every part of the thing stolen be removed from the place which that part occupied, even though the entire article is not wholly removed from its receptacle or its general location; as, for instance, to lift a bag partly out of the boot of a coach, to draw a sword partly from its scabbard, to remove goods from one part of a wagon to another, to lift a purse a few inches from the bottom of a man's pocket. Though the intent to steal be no further accomplished, the asportation is complete. (*Rex v. Walsh*, 1 Moody, 14; *Harrison v. People*, 50 N. Y. 518; *Comm. v. Luckis*, 99 Mass. 431.) But the chattel must be entirely in the thief's possession, though but for a moment. If it be confined by any fastening,—as by a cord or a chain,—there will be no complete asportation, though it be removed as far as the fastening will permit; in such cases, the owner is not wholly deprived of his possession. (1 Hale, P. C. 508.) But since the briefest interval of complete possession is sufficient, immediate restitution of the property will not purge the guilt of the offender. (1 Leach, C. L. 266.)

quite make off with them, is a sufficient asportation, or carrying away. As if a man be leading another's horse out of a close, and be apprehended in the fact; or if a guest, stealing goods out of an inn, has removed them from his chamber down stairs: these have been adjudged sufficient carryings away, to constitute a larceny. Or if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprised before he can make his escape with it; this is larceny.

3. This taking, and carrying away, must also be *felonious*; that is, done *animo furandi*: or, as the civil law expresses it, *lucri causa*. This requisite, besides excusing those who labor under incapacities of mind or will (of whom we spoke sufficiently at the entrance of this book), indemnifies also mere trespassers, and other petty offenders. As if a servant takes his master's horse without his knowledge, and brings him home again: if a neighbor takes another's plough that is left in the field, and uses it upon his own land, and then returns it: if under color of arrear of rent, where none is due, I distrain another's cattle, or seize them: all these are misdemeanors and trespasses, but no felonies. The ordinary discovery of a felonious intent is where the party doth it clandestinely; or, being charged with the fact, denies it. But this is by no means the only criterion of criminality: for in cases that may amount to larceny, the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those, which may evidence a felonious intent, or *animum furandi*: wherefore they must be left to the due and attentive consideration of the court and jury.⁵

4. This felonious taking and carrying away must be *of the*

⁵ If property be taken under a claim of title, though the claim be unfounded, or if it be taken by mistake, or with intent merely to use and then return it, no larceny is committed, because the element of felonious intent, the *animus furandi* is lacking. (*Merry v. Green*, 7 M. & W. 623; *McCourt v. People*, 64 N. Y. 583) It is also an important rule, that the intent to steal must exist at the time of the trespass or wrongful taking, and not subsequently. Thus, if one should take another's property, with the intent to retain it for the owner and deliver it to him, and should afterwards misappropriate it under the influence of a subsequently formed intent to steal, the act would not be larceny. (*Wilson v. People*, 39 N. Y. 459; *People v. Anderson*, 14 Johns. 294.) The question as to the nature of the intent is to be determined by the jury, from all the circumstances of the case.

personal goods of another: for if they are things *real*, or savor of the realty, larceny at the common law cannot be committed of them. Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot in their nature be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larceny could be committed by the rules of the common law: but the severance of them was, and in many things is still, merely a trespass; which depended on a subtilty in the legal notions of our ancestors. These things were parcel of the real estate; and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable. And if they were severed by violence, so as to be changed into movables; and at the same time, by one and the same continued act, carried off by the person who severed them; they could never be said to be taken *from the proprietor*, in this their newly acquired state of mobility (which is essential to the nature of larceny), being never, as such, in the actual or constructive possession of any one, but of him who committed the trespass. He could not in strictness be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs them at *one* time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid; and comes again at *another* time, when they are so turned into personalty, and takes them away; it is larceny: and so it is, if the owner, or any one else has severed them. Upon nearly the same principle, the stealing of writings relating to real estate is no felony; but a trespass: because they concern the land or (according to our technical language) *savor of the realty*, and are considered as part of it by the law: so that they descend to the heir together with the land which they concern.

Bonds, bills, and notes, which concern mere *choses in action* were also at the common law held not to be such goods whereof larceny might be committed; being of no intrinsic value; and not importing any property in *possession* of the person from whom they are taken.⁶

⁶ These rules of the common-law in regard to the kinds of property that may be the subject of larceny, have been to a considerable extent changed by

Larceny also cannot be committed of such animals, in which there is no property either absolute or qualified; as of beasts that are *feræ naturæ*, and unreclaimed, such as deer, hares, and conies, in a forest, chase, or warren; fish, in an open river or pond: or wild fowls at their natural liberty. But if they are reclaimed or confined, and may serve for food, it is otherwise even at common law: for of deer so inclosed in a park that they may be taken at pleasure, fish in a trunk, and pheasants or partridges in a mew, larceny may be committed. It is also said that, if swans be lawfully marked, it is felony to steal them, though at large in a public river; and that it is likewise felony to steal them, though unmarked, if in any private river or pond; otherwise it is only a trespass. But of all valuable domestic animals, as horses and other beasts of draught, and of all animals *domitæ naturæ*, which serve for food, as neat or other cattle, swine, poultry, and the like, and of their fruit or produce, taken from them while living, as milk or wool, larceny may be committed; and also of the flesh of such as are either *domitæ* or *feræ naturæ*, when killed. As to those animals, which do not serve for food, and which therefore the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them, yet they are not of such estimation, as that the crime of stealing them amounts to larceny.⁷

Notwithstanding, however, that no larceny can be committed, unless there be some property in the thing taken, and an owner; yet, if the owner be unknown, provided there be a property, it is larceny to steal it; and an indictment will lie, for the goods of a person unknown. In like manner as among the Romans, the

legislation, both in England and in this country. Thus, it is frequently provided that *choses* in action, deeds, and a large variety of articles which savor of the realty, but are readily detached from the land with which they are connected, — such as trees, shrubs, fruit, crops, ore, etc., — may be the subjects of larceny. But, so far as such statutory changes have not been made, the principles of the common law are still in force.

⁷ Statutes have been passed in England for the prevention and punishment of dog-stealing; also to prevent the unlawful taking of fish within the grounds of another, or the killing of game, etc. Similar statutes have been enacted in some of the States of this country. It has been held in New York that larceny may be committed by stealing a dog, by reason of the statute making all personal property the subject of this offense. (*People v. Campbell*, 4 Parker, 386; *Mullaly v. People*, 86 N. Y. 365; see 79 Ind. 9; 84 Ky. 681.)

lex Hostilia de furtis provided that a prosecution for theft might be carried on without the intervention of the owner. This is the case of stealing a shroud out of a grave; which is the property of those, whoever they were, that buried the deceased: but stealing the corpse itself, which has no owner, (though a matter of great indecency), is no felony, unless some of the grave-clothes be stolen with it.⁸

Having thus considered the general nature of simple larceny, I come next to treat of its *punishment*.

Our ancient Saxon laws nominally punished theft with death, if above the value of twelvecence; but the criminal was permitted to redeem his life by a pecuniary ransom; as, among their ancestors the Germans, by a stated number of cattle. But in the ninth year of Henry the First, this power of redemption was taken away, and all persons guilty of larceny above the value of twelvecence were directed to be hanged; which law continues in force to this day.⁹ The inferior species of theft, or petit larceny, is only punished by imprisonment or whipping at common law. And thus much for the offence of *simple larceny*.¹⁰

⁸ There are statutes in most of the States of this country, making it highly penal to remove dead bodies from graves, or to open graves to remove any of the vestments of the corpse. (See *ante*, p. 537, note 4.)

⁹ Capital punishment for larceny was abolished in England, in the reign of George IV. The usual penalties now are penal servitude, and imprisonment for various terms of years.

¹⁰ *Embezzlement*.—At common-law it was held not to be larceny, but only a breach of trust, for a servant or clerk to wrongfully misappropriate personal property, which he had received from a third person for delivery to his employer, before such delivery had been made. The reason was, that larceny involved an act of trespass, and it was no trespass against the master to take goods which had never come into his possession. To remedy this deficiency in the law, a statute was passed in England, in the reign of George III. (1799), declaring such acts in breach of trust, criminal, and giving to this offense the name of embezzlement. This statute was substantially redeclared by the act 8 Geo. IV., ch. 29, and recently by the act 24 & 25 Vict., ch. 96, § 68, which is now in force. The provisions of the act 8 Geo. IV., upon which has chiefly been based the American legislation upon this subject, were as follows: "If any clerk, or servant, or any person employed for the purpose, or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession, any chattels, money or valuable security, for, in the name, or on account of his master, and shall fraudulently embezzle the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattels, money or security, was not received into the possession

Mixed or *compound* larceny is such as has all the properties of the former, but is accompanied with either one or both of the aggravations of a taking from one's *house* or *person*. First, of such master, otherwise than by the actual possession of his clerk, servant, or other person so employed."

In order to sustain a charge of embezzlement under this and similar statutes, it is necessary to prove, (1) That the person accused was a *clerk* or *servant*, or a person employed in such a capacity. (2) That he received the property "*by virtue of his employment.*" (3) That the property, at the time of conversion, was not in the actual or constructive possession of the master. (4) That he converted or appropriated the property to his own use, without the consent, and against the will of the master, with intent to steal or embezzle.

(1) In order that a person may be a "clerk" or "servant," within the meaning of the statute, it is held that he should be under the immediate and uniform control and direction of his employer, within his particular department of service. (*Regina v. Negus*, L. R., 2 C. C. 34.) But, if a person be employed to render a service, in which he is allowed a large measure of discretion as to the employment of his time, and the performance of the duties he undertakes, as, for instance, to solicit orders from customers, or to act as insurance agent, and secure applications for insurance, etc.,—he is not within the terms of the statute, and not chargeable with embezzlement. (*Regina v. Bowers*, L. R. 1 C. C. 41.) But, in some of the American statutes, the term "agent" is used, and persons so employed would be included, though excluded from the English Statute. (See *Comm. v. Foster*, 107 Mass. 221; *Comm. v. Tuckerman*, 10 Gray, 173.) But even this term would not include a mechanic or manufacturer, to whom goods were sent for repairs, or purposes of manufacture. (*Comm. v. Young*, 9 Gray, 5.)

(2) A servant will not be guilty of embezzlement, if he appropriates property received without the scope of his employment. (*Rex v. Hawtin*, 7 C. & P. 281; *Rex v. Snowley*, 4 C. & P., 390; *Regina v. Wilson*, 9 C. & P., 27.) In the present English statute, the phrase "*by virtue of his employment*" has been omitted, and it is only necessary that the property should be received by the servant. "*for, in the name of, or on account of the master.*" (*Queen v. Cullum*, L. R. 2 C. C., 28.) But, in the American statutes, this phrase is generally retained.

(3) If the property were actually or constructively in the possession of the master at the time of the conversion, the offense would be larceny, and not embezzlement. (*Rex v. Murray*, 5 C. & P. 143. note; *Comm. v. O'Malley*, 97 Mass. 584; *Comm. v. Barry*, 116 Mass. 1.) But, under the particular phraseology of some American statutes, there does not appear to be a precise and clear line of distinction drawn between larceny and embezzlement, and certain classes of cases are said to come within the statute which would also be larceny at common-law. (*People v. Dalton*, 15 Wend. 583; *People v. Hennessey*, 15 Wend. 147; 110 Ill. 627.)

The property converted must, under the English statute, belong to the master, and be received by the servant for the master. If, therefore, a ser-

therefore, of larceny from the *house*, and then of larceny from the *person*.

1. Larceny from the *house*, though it seems (from the considerations mentioned in the preceding chapter) to have a higher degree of guilt than simple larceny, yet it is not at all distinguished from the other at common law; unless where it is accompanied with the circumstance of breaking the house by night; and then we have seen that it falls under another description, *viz.*, that of burglary. But now by several acts of parliament (the history of which is very ingeniously deduced by a learned modern writer, who hath shown them to have gradually arisen from our improvements in trade and opulence), the benefit

vanant should use his master's carriage in driving persons, to earn money for himself, and should appropriate the proceeds, it would not be embezzlement. (*Queen v. Cullum*, L. R. 2 C. C. 28.) But, under some American statutes, now or heretofore in force, it has been held sufficient that the property be that of some other person than the servant; and it may belong to a third person, as well as to the master. If, therefore, a third person's chattels be received by the servant by virtue of his employment, it will be embezzlement under such statutes to wrongfully appropriate them. (*People v. Hennessey*, 15 Wend. 147; *People v. Dalton*, 15 Wend. 581; see 2 Met. 343; 110 Ill. 627.)

But both in England and in this country, if the nature of the occupation is such that the person employed is entitled to consider the property received as his own, while he merely becomes debtor for an equivalent sum to the employer, it is not embezzlement to appropriate it; as, for instance, if an auctioneer sells goods for the owner, and appropriates the proceeds to his own use. The relation is really that of debtor and creditor, and one cannot be guilty of embezzlement, merely by making use of funds which he may regard as his own. (*Regina v. Chapman*, 1 C. & M., 119; *Comm. v. Stearns*, 2 Met. 343; *Comm. v. Foster*, 107 Mass. 221; *People v. Howe*, 2 T. & C. 383.)

(4) The property must have been taken with intent to steal, as in larceny. If a person, reasonably and in good faith, believes that he is entitled to the property entrusted to him, and that the person to whom it was sent was not fairly entitled to it, his retaining it will not amount to embezzlement, even though he should in reality be entirely mistaken in his claim. But if he knew it to be the other person's property, the rule would be different. (*Comm. v. Concannon*, 5 Allen, 502; *People v. Galland*, 55 Mich. 628.)

There are also in England and in various States of this country statutes for the punishment of embezzlement by factors, brokers, public officers, trustees of charitable societies, etc. Information must be sought by referring to the statutes themselves. The term "embezzlement" is also sometimes applied to the wrongful conversion of goods by carriers without "breaking bulk;" but this has been referred to in a previous note. (See note 2, *ante*.) By a late statute in New York larceny has been made broad enough to cover embezzlement. (Penal Code, § 528.)

of clergy is taken from larcenies committed in a house in almost every instance.

2. Larceny from the *person* is either by *privately* stealing ; or by open and violent assault, which is usually called *robbery*.

The offence of *privately* stealing from a man's *person*, as by picking his pocket or the like, privily without his knowledge, was debarred of the benefit of clergy, so early as by the statute 8 Eliz., ch. 4. But then it must be such a larceny as stands in need of the benefit of clergy, *viz.*, of above the value of twelve-pence ; or else the offender shall not have judgment of death. For the statute creates no new offence ; but only prevents the prisoner from praying the benefit of clergy, and leaves him to the regular judgment of the ancient law. This severity (for a most severe law it certainly is) seems to be owing to the ease with which such offences are committed, the difficulty of guarding against them, and the boldness with which they were practised (even in the Queen's Court and presence) at the time when this statute was made : besides that this is an infringement of property, in the manual occupation or corporeal possession of the owner, which was an offence even in a state of nature. And therefore the *saccularii*, or cutpurses, were more severely punished than common thieves by the Roman and Athenian laws.¹¹

Open and violent larceny from the *person*, or *robbery*, the *rapina* of the civilians, is the felonious and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear.¹² 1. There must be a taking, otherwise

¹¹ The various statutes referred to in the text, in reference to compound larceny, have been superseded by the provisions of the act 24 & 25 Vict., ch. 96. Stealing from a dwelling house or vessel, or privately from the person, are aggravated forms of larceny, punishable with severer penalties than ordinary larcenies. Similar statutes have been generally enacted in the United States. Thus, in New York, if larceny be committed in a house or vessel by night of property worth \$25 or more, the offense is grand larceny in the first degree, to which particularly severe penalties are attached ; and stealing from the person is grand larceny, though the property taken be of less value than \$25. In ordinary cases, this would only be petit larceny. (Penal Code, §§ 530-531.)

¹² It is essential to the offense of robbery, that there should be a *caption* and *asportation* of the goods ; and the same rules prevail upon this point as in the crime of larceny. (See *ante*, note 2.) The property must be entirely in the robber's possession though but for an instant, be wholly detached from all fastenings, and every part of it must have been removed from the position which that part occupied. Thus, where an ear-ring was torn from a lady's

it is no robbery. If the thief, having once taken a purse returns it, still it is a robbery; and so it is whether the taking be strictly from the person of another, or in his presence only; as, where a ear, but was immediately dropped into her hair, where it was afterwards found, there was held to be a sufficient asportation. (*Lapier's Case*, 1 Leach, C. L. 360.) Immediate restitution of the property to the owner will not relieve the wrongdoer from the guilt of robbery.

The taking must be *from the owner's person, or in his presence*. Thus, it will be sufficient if the robber takes up a cloak, or purse, or other article, which the owner has dropped, while the owner is standing by. But, if the owner has left the place, the act does not constitute robbery. (2 Strange, 1015; see 72 Ia. 432.) It is not necessary that the person from whom the goods are taken, should be the absolute owner of them. Any one who has the property in his possession, is deemed to have the rightful title as against the robber. If goods be stolen from a child, while the father is absent, they may be described in the indictment as the property of the child. (*Brooks v. People*, 49 N. Y. 436.)

The taking must be *by force, or putting in fear*. If actual force be used, it must be applied directly against the person of the one who is robbed, or used in overcoming resistance caused by the fastenings of the article stolen. It is not sufficient to take the property from him stealthily, as by furtively picking his pocket, or to snatch it from him suddenly, without sensible violence to his person, as by snatching a cane quickly out of a person's hand, or a hat from his head. (5 Parker, 299; 12 Mo. App. 374; 69 Ala. 249.) But it has been held robbery to snatch a diamond-pin from a lady's hair, with which it was so much intertwined that part of the hair was torn out. (*Moore's Case*, 1 Leach, 335.) And the same would be true if sensible violence were necessary in any case to overcome, or break through fastenings. It is enough, moreover, that the force used be employed to divert the owner's attention, while he is deprived of his property. (*Mahoney v. People*, 5 T. & C. 329; 3 Hun, 202.)

When the robbery is effected by "putting in fear," the fear excited may be either of injury to the *person*, or to the *property*, or to the *reputation*. There must be such circumstances of terror, such modes of threatening violence, as, in common experience, would be likely to induce a man to part with his property. Menacing *words* are not necessary, for threatening acts or gestures may be sufficient to induce feelings of fear or terror; as, if one should beg alms with a drawn sword.

The most common cases of robbery effected by causing fear of injury to *property*, have been those where the outrages of a mob have been threatened, if money or property were not delivered up. Such cases are, however, rare in modern times.

The only form of defamatory charge in injury to the *reputation*, by which robbery can be effected, is that of committing unnatural practices,—the crime against nature. (*People v. McDaniels*, 1 Parker, 198.)

These common-law rules and principles have been, to some extent, modified by the legislation of different States, but have not been changed in essential respects.

robber by menaces and violence puts a man in fear, and drives away his sheep or his cattle before his face. But if the taking be not either directly from his person, or in his presence, it is no robbery. 2. It is immaterial of what value the thing taken is : a penny as well as a pound, thus forcibly extorted, makes a robbery. 3. Lastly, the taking must be by force, or a previous putting in fear ; which makes the violation of the person more atrocious than privately stealing. For according to the maxim of the civil law, "*qui vi rapuit, fur improbius esse videtur.*" This previous violence, or putting in fear, is the criterion that distinguishes robbery from other larcenies. For if one privately steals sixpence from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent : neither is it capital, as privately stealing, being under the value of twelvecence. Not that it is indeed necessary, though usual, to lay in the indictment that the robbery was committed by *putting in fear* ; it is sufficient, if laid to be done by *violence*. And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed : it is enough that so much force, or threatening by word or gesture, be used, as might create an apprehension of danger, or induce a man to part with his property without or against his consent. Thus, if a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be *put in fear*, yet this is undoubtedly a robbery. Or, if a person with a sword drawn begs an alms, and I give it him through mistrust and apprehension of violence, this is a felonious robbery. So if, under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him. But it is doubted, whether the forcing a higgler, or other chapman, to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery.

II. *Malicious mischief*, or damage, is the next species of injury to private property, which the law considers as a public crime. This is such as is done, not *animo furandi*, or with an intent of gaining by another's loss ; which is some, though a weak, excuse ; but either out of a spirit of wanton cruelty, or black and diabolical revenge. In which it bears a near relation to the crime of arson ; for as that affects the habitation, so this does the other property, of individuals. And, therefore, any

damage arising from this mischievous disposition, though only a trespass at common law, is now by a multitude of statutes made penal in the highest degree.¹³

III. Forgery, or the *crimen falsi*, is an offence, which was punished by the civil law with deportation or banishment, and sometimes with death. It may with us be defined, at common law, to be, "the fraudulent making or alteration of a writing to the prejudice of another man's right;" for which the offender may suffer fine, imprisonment, and pillory.¹⁴ And also by a variety

¹³ Comprehensive statutes have been enacted in England, and in the various States of the Union, declaring a large variety of acts of malicious mischief to be criminal offenses, and prescribing penalties for their commission. Among the most common malicious injuries that are thus prohibited are the following: Killing, wounding or maiming domestic animals; destroying, or injuring trees, crops, shrubs, fruit, timber, etc.; injuring or defacing any monument, or work of art, building or other structure; injuring or destroying ships or vessels, removing buoys; placing obstructions upon railroads; carrying away valuable soil from a person's premises, etc.; and, generally, it may be said that nearly every form of malicious injury to property, whether real or personal, is made penal by statute. Most offenses of this kind are declared to be misdemeanors, as distinguished from felonies.

¹⁴ Forgery, by the common law, is the wrongful making or alteration of a writing, with intent to deceive and defraud by its fictitious appearance of genuineness. The essence of the offense lies in its tendency to effect a fraud by giving to an instrument an apparent legal efficacy, which it would not otherwise have possessed. The instrument, therefore, must either appear on its face to be, or be in fact, one which, if true, would possess some legal validity; it must be legally capable of effecting a fraud. If a writing be invalid upon its face, so that if genuine, it would have no legal efficacy, it cannot be the subject of forgery. (*People v. Shall*, 9 Cowen, 778; *People v. Harrison*, 8 Barb. 560.) It is not forgery, for example, to fraudulently alter a will which is not attested by the requisite number of witnesses (*Rex v. Wall*, 2 East. P. C. 953.) "But there is a distinction between the case of an instrument apparently void, and one where the invalidity is to be made out by the proof of some extrinsic fact. In the former case, the party who makes the instrument, cannot, in general, be convicted of forgery, but in the latter he may." (*People v. Galloway*, 17 Wend. 540.) If, therefore, the invalidity is only discoverable upon inquiry and examination, the fraudulent fabrication will constitute forgery. It is a general rule that any instrument is of sufficient legal efficacy to be the subject of forgery, when it may be made the foundation of a legal liability, or injuriously compromise the interests of persons relying upon its genuineness. Thus, forgery may be committed by making or altering a bond, a bill of exchange or promissory note, an assignment of a legal claim,

of statutes, a more severe punishment is inflicted on the offender in many particular cases, which are so multiplied of late as almost to become general. I shall mention the principal instances.

a receipt, a letter of credit, an order for the delivery of money or goods, a testimonial of character as a servant, a letter of recommendation for an appointment to office, or other similar instruments. (*Bowles v. State*, 37 O. St. 35; *Comm. v. Welch*, 148 Mass. 296; *Reg. v. Moah*, 7 Cox C. C. 503; *Noakes v. People*, 25 N. Y. 380; see 53 Mich. 523; 32 Kan. 360; 61 Md. 309.)

Any alteration of an instrument is sufficient to constitute forgery by which its legal effect is in any respect altered. It is not necessary that the whole writing should be fictitious. Making a fraudulent insertion, alteration, or erasure, in any material part of a true document, by which another may be defrauded; the addition of a false signature to a true instrument, or a real signature to a false one; the insertion of paragraphs, or clauses, or the change of a word or a letter, by which the legal effect of the instrument is changed, are sufficient acts of forgery. But the alteration, to be sufficient, must be material. It is not, therefore, forgery to insert in a written instrument any word which the law would supply. Signing the name of a fictitious person to an instrument, or of a person deceased, is a fraudulent alteration, as well as the unauthorized use of the name of a living person. A man may even be guilty of forgery by the use of his own name; as when one endorses a bill of exchange, made payable to another person of the same name, and thus negotiates it, knowing that he has no valid title. (*Mead v. Young*, 4 T. R. 28; *People v. Peacock*, 6 Cowen, 72.) A document that is printed, or partly written and partly printed, may be the subject of forgery, as well as one that is entirely written. (*Benson v. McMahon*, 127 U. S. 457.)

In forgeries, as in other criminal offenses, an evil or criminal intent is necessary. This is not necessarily an intent to defraud a particular person or persons; it is sufficient, if the design be to use the fictitious instrument as genuine. If a forged instrument, therefore, be used, or put into circulation, the offense will be complete, although the forger intends to take such action subsequently as will avert all injury to those whose interests are affected. But if one employ another's signature, believing on reasonable grounds that he is authorized so to do as agent, there will be no forgery, on account of the absence of fraudulent purpose. (*Reg. v. Geach*, 9 C. & P. 499; *Comm. v. Henry*, 118 Mass. 460; *Parmelee v. People*, 8 Hun, 623.)

It is not necessary, by the common law, that any actual injury should result from the forgery. The mere making or alteration of the writing, with evil intent, is alone sufficient.

Both in England and in this country, there are comprehensive statutes relating to the offense of forgery; and the provisions are frequently minute and specific, to prevent the fraudulent fabrication of a large variety of legal instruments. It is a general rule, that an alleged offender may be prosecuted either under the State statute or under the common-law, if his act would constitute forgery under either system of principles. But, in some States, the common-law procedure has been entirely rejected.

Uttering forged instruments, i. e., attempting to perpetrate an actual fraud

By statute 5 Eliz., ch. 14, to forge or make, or knowingly to publish or give in evidence, any forged deed, court-roll, or will, with intent to affect the right of real property, either freehold or copyhold, is punished by a forfeiture to the party grieved of double costs and damages : by standing in the pillory, and having both his ears cut off, and his nostrils slit, and seared ; by forfeiture to the crown of the profits of his lands, and by perpetual imprisonment. For any forgery relating to a term of years, or annuity, bond, obligation, acquittance, release, or discharge of any debt or demand of any personal chattels, the same forfeiture is given to the party grieved ; and on the offender is inflicted the pillory, loss of one of his ears, and a year's imprisonment ; the second offence in both cases being felony without benefit of clergy.

Besides this general act, a multitude of others, since the Revolution (when paper-credit was first established), have inflicted capital punishment on the forging, altering, or uttering as true, when forged, of any bank bills or notes, or other securities ; of bills of credit issued from the exchequer ; of South-sea bonds, &c. ; of lottery tickets or orders ; of army or navy debentures ; of East India bonds ; of writings under the seal of the London, or royal exchange assurance ; of a letter of attorney or other power to receive or transfer stock or annuities ; and on the personating a proprietor thereof, to receive or transfer such annuities, stock, or dividends, &c.

There are also certain other general laws, with regard to forgery. So that I believe, through the number of these general and special provisions, there is now hardly a case possible to be conceived wherein forgery, that tends to defraud, whether in the name of a real or fictitious person, is not made a capital crime.

These are the principal infringements of the rights of property ; which were the last species of offences against individuals or private subjects which the method of distribution has led us to consider. We have before examined the nature of all offences

by using them as genuine, was not at common law an essential element of the crime of forgery.. It is deemed, however, to be a substantive offense, and is often so declared by statute. The putting of a forged deed on record has been held to be an uttering of it. (*Paige v. People*, 3 Abb. Dec. [N. Y.] 439.)

against the public, or commonwealth, against the king or supreme magistrate, the father and protector of that community ; against the universal law of all civilized nations, together with some of the more atrocious offences, of publicly pernicious consequence, against God and his holy religion. And these several heads comprehend the whole circle of crimes and misdemeanors, with the punishment annexed to each that are cognizable by the laws of England.

CHAPTER XVI.

[BL. COMM.—BOOK IV. CH. XVIII.]

Of the Means of Preventing Offences.

WE are now arrived at the fifth general branch, or head under which I proposed to consider the subject of this book of our Commentaries ; *viz.*, the means of *preventing* the commission of crimes and misdemeanors. And really it is an honor, and almost a singular one, to our English laws, that they furnish a title of this sort ; since *preventive* justice is upon every principle of reason, of humanity, and of sound policy preferable in all respects to *punishing* justice ; the execution of which, though necessary, and in its consequences a species of mercy to the commonwealth, is always attended with many harsh and disagreeable circumstances.

This preventive justice consists in obliging those persons, whom there is a probable ground to suspect of future misbehavior, to stipulate with and to give full assurance to the public that such offence as is apprehended shall not happen ; by finding pledges or securities for keeping the peace or for their good behavior. Let us therefore consider, first, what this security is ; next, who may take or demand it ; and lastly, how it may be discharged.

1. This security consists in being bound, with one or more securities, in a recognizance or obligation to the king, entered on record, and taken in some court or by some judicial officer ;

whereby the parties acknowledge themselves to be indebted to the crown in the sum required (for instance 100*l.*), with condition to be void and of none effect, if the party shall appear in court on such a day, and in the meantime shall keep the peace either generally, towards the king and all his liege people ; or particularly also, with regard to the person who craves the security. Or if it be for the good behavior, then on condition that he shall demean and behave himself well (or be of good behavior), either generally or specially, for the time therein limited, as for one or more years, or for life. This recognizance, if taken by a justice of the peace, must be certified to the next sessions in pursuance of the statute 3 Hen. VII., ch. 1, and if the condition of such recognizance be broken, by any breach of the peace in the one case, or any misbehavior in the other, the recognizance becomes forfeited or absolute : and being *estreated* or extracted (taken out from among the other records) and sent up to the exchequer, the party and his sureties, having now become the king's absolute debtors, are sued for the several sums in which they are respectively bound.

2. Any justices of the peace, by virtue of their commission, or those who are *ex officio* conservators of the peace, as was mentioned in a former volume, may demand such security according to their own discretion : or it may be granted at the request of any subject, upon due cause shown, provided such demandant be under the king's protection. Wives may demand it against their husbands ; or husbands, if necessary, against their wives. But feme coverts, and infants under age, ought to find security by their friends only, and not to be bound themselves : for they are incapable of engaging themselves to answer any debt ; which as we observed, is the nature of these recognizances or acknowledgments.

3. A recognizance may be discharged, either by the demise of the king to whom the recognizance is made ; or by the death of the principal party bound thereby, if not before forfeited ; or by order of the court to which such recognizance is certified by the justices (as the quarter sessions, assizes, or king's bench), if they see sufficient cause ; or in case he at whose request it was granted, if granted upon a private account, will release it, or does not make his appearance to pray that it may be continued.

Thus far what has been said is applicable to both species of recognizances, for the *peace* and for the *good behavior: de pace, et legalitate, tuenda*, as expressed in the laws of King Edward. But as these two species of securities are in some respects different, especially as to the cause of granting, or the means of forfeiting them, I shall now consider them separately : and first, shall show for what cause such a recognizance, with sureties for the *peace*, is grantable ; and then, how it may be forfeited.

1. Any justice of the peace may, *ex officio*, bind all those to keep the peace, who in his presence make any affray ; or threaten to kill or beat another ; or contend together with hot and angry words ; or go about with unusual weapons or attendance, to the terror of the people ; and all such as he knows to be common barretors ; and such as are brought before him by the constable for a breach of peace in his presence ; and all such persons, as, having been before bound to the peace, have broken it and forfeited their recognizances. Also, wherever any private man hath just cause to fear that another will burn his house or do him a corporal injury, by killing, imprisoning, or beating him ; or that he will procure others so to do ; he may demand surety of the peace against such person : and every justice of the peace is bound to grant it, if he who demands it will make oath, that he is actually under fear of death or bodily harm ; and will show that he has just cause to be so, by reason of the other's menaces, attempts, or having lain in wait for him ; and will also farther swear, that he does not require such surety out of malice, or for mere vexation. This is called *swearing the peace* against another : and, if the party does not find such sureties, as the justice in his discretion shall require, he may immediately be committed till he does.

2. Such recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an assault, or menace, to the person of him who demanded it, if it be a special recognizance ; or, if the recognizance be general, by any unlawful action whatsoever, that either is or tends to a breach of the peace ; or more particularly, by any one of the many species of offences which are mentioned as crimes against the public peace in the ninth chapter of this book : or by any private violence committed against any of His Majesty's subjects. But a bare trespass upon the lands or goods of another, which is a ground

for a civil action, unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance. Neither are mere reproachful words, as calling a man a knave or liar, any breach of the peace, so as to forfeit one's recognizance (being looked upon to be merely the effect of unmeaning heat and passion), unless they amount to a challenge to fight.

The other species of recognizance, with sureties, is for the *good abearance* or *good behavior*. This includes security for the peace, and somewhat more: we will therefore examine it in the same manner as the other.

1. First, then, the justices are empowered by the statute 34 Edw. III., ch. 1, to bind over to the good behavior towards the king and his people, all them *that be not of good fame*, wherever they be found; to the intent that the people be not troubled nor endangered, nor the peace diminished, nor merchants and others, passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expression, *that be not of good fame*, it is holden that a man may be bound to his good behavior for causes of scandal, *contra bonos mores*, as well as *contra pacem*: as, for haunting bawdy-houses with women of bad fame; or for keeping such women in his own house: or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night-walkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day, and wake in the night; common drunkards; whoremasters; the putative fathers of bastards; cheats; idle vagabonds; and other persons whose misbehavior may reasonably bring them within the general words of the statutes, as persons not of good fame: an expression, it must be owned, of so great a latitude, as leaves much to be determined by the discretion of the magistrate himself. But if he commits a man for want of sureties, he must express the cause thereof with convenient certainty; and take care that such cause be a good one.

2. A recognizance for the good behavior may be forfeited by all the same means, as one for the security of the peace may be; and also by some others. As, by going armed with unusual attendance, to the terror of the people; by speaking words tending to sedition; or by committing any of those acts of misbehavior,

which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion of that which perhaps may never actually happen: for, though it is just to compel suspected persons to give security to the public against misbehavior that is apprehended; yet it would be hard, upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance.¹

CHAPTER XVII.

[BL. COMM.—BOOK IV. CH. XIX.]

Of Courts of a Criminal Jurisdiction.

THE sixth, and last, object of our inquiries will be the method of *inflicting* those *punishments*, which the law has annexed to particular offences; and which I have constantly subjoined to the description of the crime itself. In the discussion of which I shall pursue much the same general method that I followed in the preceding book, with regard to the redress of civil injuries: by, first, pointing out the several *courts* of criminal jurisdiction, wherein offenders may be prosecuted to punishment; and by, secondly, deducing down, in their natural order, and explaining, the several *proceedings* therein.

First, then, in reckoning up the several *courts* of criminal jurisdiction, I shall, as in the former case, begin with an account of such as are of a *public* and *general* jurisdiction throughout the whole realm; and, afterwards, proceed to such as are only of a *private* and *special* jurisdiction, and confined to some particular parts of the kingdom.

1. The high court of *parliament*; which is the supreme court in the kingdom, not only for the making, but also for the execu-

¹ The subjects of this chapter are matters of statutory regulation in the various States of the Union; but there is a close resemblance between the practice in this country and that detailed in the text; and the classes of cases in which persons may be bound over to keep the peace, are very much the same as those here mentioned.

tion of laws; by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for acts of parliament to attain particular persons of treason or felony, or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose, I speak not of them; being to all intents and purposes new laws, made *pro re nata*, and by no means an execution of such as are already in being. But an impeachment before the lords by the commons of Great Britain, in parliament, is a prosecution of the already known and established law, and has been frequently put in practice; being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom. A commoner cannot, however, be impeached before the lords for any capital offence, but only for high misdemeanors: a peer may be impeached for any crime. And they usually (in case of an impeachment of a peer for treason) address the Crown to appoint a lord high steward for the greater dignity and regularity of their proceedings; which high steward was formerly elected by the peers themselves, though he was generally commissioned by the king; but it hath of late years been strenuously maintained, that the appointment of a high steward in such cases is not indispensably necessary, but that the house may proceed without one. The articles of impeachment are a kind of bills of indictment, found by the House of Commons, and afterwards tried by the Lords; who are in cases of misdemeanors considered not only as their own peers, but as the peers of the whole nation. This is a custom derived to us from the constitution of the ancient Germans; who in their great councils sometimes tried capital accusations relating to the public: "*licet apud consilium accusare quoque, et discrimen capitis intendere.*" And it has a peculiar propriety in the English constitution; which has much improved upon the ancient model imported hither from the continent. For, though in general the union of the legislative and judicial powers ought to be most carefully avoided, yet it may happen that a subject, intrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of such crimes, as the ordinary magistrate either dares not or cannot punish. Of these the representatives of the people, or House of Commons, cannot properly judge; because their constituents are the parties injured, and can there-

fore only *impeach*. But before what court shall this impeachment be tried? Not before the ordinary tribunals, which would naturally be swayed by the authority of so powerful an accuser. Reason therefore will suggest, that this branch of the legislature, which represents the people, must bring its charge before the other branch, which consists of the nobility, who have neither the same interests nor the same passions as popular assemblies. This is a vast superiority, which the constitution of this island enjoys, over those of the Grecian or Roman republics; where the people were at the same time both judges and accusers. It is proper that the nobility should judge, to insure justice to the accused, as it is proper that the people should accuse, to insure justice to the commonwealth. And therefore, among other extraordinary circumstances attending the authority of this court, there is one of a very singular nature, which was insisted on by the House of Commons in the case of the Earl of Danby, in the reign of Charles II.; and it is now enacted by statute 12 and 13 W. III., ch. 2, that no pardon under the great seal shall be pleadable to an impeachment by the commons of Great Britain in parliament.¹

2. The court of *king's bench*, concerning the nature of which we partly inquired in the preceding book, was (we may remember) divided into a *crown* side, and a *plea* side. And on the crown side, or crown office, it takes cognizance of all criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace. Into this court also indictments from all inferior courts may be removed by writ of *certiorari*, and tried either at bar, or at *nisi prius*, by a jury of the county out of which the indictment is brought. The judges of this court are the supreme coroners of the kingdom. And the court itself is the principal court of criminal jurisdiction known to the laws of England. For which reason by the coming of the court of king's bench into any county (as it was removed to Oxford on account of the sickness

¹ It is provided, by the United States Constitution, that charges of impeachment shall be preferred by the House of Representatives, and that they shall be tried before the Senate. In the several States of the Union, the practice is the same; the lower and the higher legislative bodies exercising respectively similar functions. (See, upon this subject, page 898, note 3, *ante*.)

in 1665), all former commissions of *oyer* and *terminer*, and general jail delivery, are at once absorbed and determined *ipso facto*.

3. The high court of *admiralty*, held before the Lord High Admiral of England, or his deputy, styled the judge of the admiralty, is not only a court of civil but also of criminal jurisdiction.² This court hath cognizance of all crimes and offences committed either upon the sea, or on the coasts, out of the body or extent of any English county; and by statute 15 Ric. II., ch. 3, of death and mayhem happening in great ships being and hovering in the main stream of great rivers, below the bridges of the same rivers, which are then a sort of ports or havens; such as are the ports of London and Gloucester, though they lie at a great distance from the sea. But, as this court proceeded without jury, in a method much conformed to the civil law, the exercise of a criminal jurisdiction there was contrary to the genius of the law of England: inasmuch as a man might be there deprived of his life by the opinion of a single judge, without the judgment of his peers. And besides, as innocent persons might thus fall a sacrifice to the caprice of a single man, so very gross offenders might, and did frequently, escape punishment: for the rule of the civil law is, how reasonably I shall not at present inquire, that no judgment of death can be given against offenders, without proof by two witnesses, or a confession of the fact by themselves. This was always a great offence to this English nation: and therefore in the eighth year of Henry VI. it was endeavored to apply a remedy in parliament: which then miscarried for want of the royal assent. However, by the statute 28 Hen. VIII., ch. 15, it was enacted, that these offences should be tried by commissioners of *oyer* and *terminer*, under the king's great seal; namely, the admiral or his deputy, and three or four more (among whom two common law judges are usually appointed); the indictment being first found by a grand jury of twelve men, and afterwards tried by a petit jury: and that the course of proceedings should be according to the law of the land.

²In regard to the present constitution of the Court of Admiralty, see *ante*, page 660, note 3. Its jurisdiction has been variously modified by statutes passed since the text was written, but it is not practicable nor important to state their provisions. In this country, admiralty and maritime jurisdiction is vested entirely in the courts of the United States.

This is now the only method of trying marine felonies in the court of admiralty; the judge of the admiralty still presiding therein, as the lord mayor is the president of the session of *oyer* and *terminer* in London.

These courts may be held in any part of the kingdom, and their jurisdiction extends over crimes that arise throughout the whole of it, from one end to the other. What follow are also of a general nature, and universally diffused over the nation, but yet are of a local jurisdiction, and confined to particular districts.* Of which species are,

4, 5. The courts of *oyer* and *terminer*, and the general *gaol-delivery*, which are held before the king's commissioners, among whom are usually two judges of the courts at Westminster, twice in every year in every county of the kingdom; except the four northern ones, where they are held only once, and London and Middlesex, wherein they are held eight times. These were slightly mentioned in the preceding book. We then observed, that, at what is usually called the assizes, the judges sit by virtue of five several authorities: two of which, the commission of *assize* and its attendant jurisdiction of *nisi prius*, being principally of a civil nature, were then explained at large; to which I shall only add, that these justices have, by virtue of several statutes, a criminal jurisdiction also, in certain special cases. The third, which is the commission of the *peace*, was also treated of in a former volume, when we inquired into the nature and office of a justice of the peace. I shall only add, that all the justices of the peace of any county, wherein the assizes are held, are bound by law to attend them, or else are liable to a fine; in order to return recognizances, &c., and to assist the judges in such matters as lie within their knowledge and jurisdiction, and in which some of them have probably been concerned, by way of previous examination. But the fourth authority is the com-

* Other criminal courts have been established in England, by recent enactments. One of these is the "Central Criminal Court," established within a district composed of London, Middlesex, and parts of adjacent Counties, and having cognizance of offenses committed within this district. The other is a court of appellate jurisdiction, established for the "consideration of crown cases reserved." This consists of the judges of the High Court of Justice, five of whom constitute a quorum. This court considers questions of law reserved upon cases tried in lower courts, which resulted in a conviction of the prisoner.

mission of *oyer* and *terminer*, to hear and determine all treasons, felonies, and misdemeanors. This is directed to the judges and several others, or any two of them ; but the judges or serjeants at law only are of the *quorum*, so that the rest cannot act without the presence of one of them. The words of the commission are, "to inquire, hear, and determine ;" so that by virtue of this commission they can only proceed upon an indictment found at the same assizes ; for they must first inquire by means of the grand jury or inquest, before they are empowered to hear and determine by the help of the petit jury. Therefore they have, besides, fifthly, a commission of general *gaol-delivery* ; which empowers them to try and deliver every prisoner, who shall be in the gaol when the judges arrive at the circuit town, whenever or before whomsoever indicted, or for whatever crime committed. It was anciently the course to issue special writs of gaol-delivery for each particular prisoner, which were called the writs *de bono et malo* : but these being found inconvenient and oppressive, a *general* commission for all the prisoners has long been established in their stead. So that, one way or other, the gaols are in general cleared, and all offenders tried, punished, or delivered, twice in every year : a constitution of singular use and excellence. Sometimes also, upon urgent occasions, the king issues a special or extraordinary commission of *oyer* and *terminer*, and *gaol-delivery*, confined to those offences which stand in need of immediate inquiry and punishment : upon which the course of proceeding is much the same, as upon general and ordinary commissions.

6. The court of general *quarter sessions* of the peace is a court that must be held in every county once in every quarter of a year. It is held before two or more justices of the peace, one of which must be of the *quorum*. The jurisdiction of this court, by statute 34 Edw. III., ch. 1, extends to the trying and determining all felonies and trespasses whatsoever : though they seldom, if ever, try any greater offence than small felonies within the benefit of clergy ; their commission providing, that if any case of difficulty arises, they shall not proceed to judgment, but in the presence of one of the justices of the court of king's bench or common pleas, or one of the judges of assize. And therefore murders, and other capital felonies, are usually remitted for a more solemn trial to the assizes. They cannot also try any new-

created offence, without express power given them by the statute which creates it. But there are many offences and particular matters, which by particular statutes belong properly to this jurisdiction, and ought to be prosecuted in this court: as, the smaller misdemeanors against the public or commonwealth, not amounting to felony; and especially offences relating to the game, highways, alehouses, bastard children, the settlement and provision of the poor, vagrants, servants' wages, apprentices, and popish recusants. Some of these are proceeded upon by indictment; and others in a summary way by motion and order thereupon; which order may, for the most part, unless guarded against by particular statutes, be removed into the court of king's bench, by a writ of *certiorari facias*, and be there either quashed or confirmed. The records or rolls of the sessions are committed to the custody of a special officer denominated the *custos rotulorum*, who is always a justice of the *quorum*; and among them of the *quorum* (saith Lambard) a man for the most part especially picked out, either for wisdom, countenance, or credit. The nomination of the *custos rotulorum* (who is the principal *civil* officer in the county, as the lord lieutenant is the chief in *military* command) is by the king's sign manual: and to him the nomination of the clerk of the peace belongs; which office he is expressly forbidden to sell for money.⁴

In most corporation towns there are quarter sessions kept before justices of their own, within their respective limits: which have exactly the same authority as the general quarter sessions of the county, except in a very few instances.⁵

⁴ The jurisdiction of the court of quarter sessions has been, in recent times, much limited by statute, and it does not now extend to the trial of capital felonies, nor of various felonies and misdemeanors of a graver class.

⁵ In this country, each State has its own system of criminal courts. Reference must be made for information to the statutes, and books of practice

CHAPTER XVIII.

[BL. COMM.—BOOK IV. CH. XX.]

Of Summary Convictions.

WE are next, according to the plan I have laid down, to take into consideration the proceedings in the courts of criminal jurisdiction, in order to the punishment of offences. These are plain, easy, and regular; the law not admitting any fictions, as in civil causes, to take place where the life, the liberty, and the safety of the subject are more immediately brought into jeopardy. And these proceedings are divisible into two kinds; *summary* and *regular*: of the former, of which I shall briefly speak, before we enter upon the latter, which will require a more thorough and particular examination.

By a *summary* proceeding I mean principally such as is directed by several acts of parliament (for the common law is a stranger to it, unless in the case of contempts) for the conviction of offenders, and the inflicting of certain penalties created by those acts of parliament. In these there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such persons only, as the statute has appointed for his judge. An institution designed professedly for the greater ease of the subject, by doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attendances to try every minute offence. But it has of late been so far extended as, if a check be not timely given, to threaten the disuse of our admirable and truly English trial by jury, unless only in capital cases. For,

I. Of this summary nature are all trials of offences and frauds contrary to the law of the *excise*, and other branches of the *revenue*: which are to be inquired into and determined by the commissioners of the respective departments, or by justices of the peace in the country.

II. Another branch of summary proceedings is that before *justices of the peace*, in order to inflict divers petty pecuniary

mulcts, and corporal penalties denounced by act of parliament for many disorderly offences; such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others.

The process of these summary convictions, it must be owned, is extremely speedy. Though the courts of common law have thrown in one check upon them, by making it necessary to *summon* the party accused before he is condemned. After this summons, the magistrate, in summary proceedings, may go on to examine one or more witnesses, as the statute may require, upon oath; and then make his conviction of the offender, in writing: upon which he usually issues his warrant, either to apprehend the offender, in case corporal punishment is to be inflicted on him; or else to levy the penalty incurred, by distress and sale of his goods. This is in general, the method of summary proceedings before a justice or justices of the peace; but for particulars we must have recourse to the several statutes, which create the offence, or inflict the punishment: and which usually chalk out the method by which offenders are to be convicted. Otherwise they fall of course under the general rule, and can only be convicted by indictment or information at the common law.¹

III. To this head, of summary proceedings, may also be properly referred the method, immemorially used by the superior courts of justice, of punishing contempts by *attachment*, and the subsequent proceedings thereon.

The contempts, that are thus punished, are either *direct*, which openly insult or resist the powers of the courts, or the persons of the judges who preside there; or else are *consequential*, which (without such gross insolence or direct opposition)

¹ Provision is generally made by statute in the several States of this country, for summary convictions before justices of the peace or inferior magistrates, for vagrancy, idleness, profane swearing, disorderly and riotous practices, etc. It is a general rule that the methods of procedure prescribed by such statutes must be strictly followed. (*Beadleston v. Sprague*, 6 Johns. 101.) Such statutes have been held not to be unconstitutional, though they dispense with trial by jury; since they continue an established practice of the English law, which has been from the earliest period a part of our judicial system. (*Duffy v. People*, 1 Hill, 355; 6 Id. 75; *Byers v. Comm.*, 42 Pa. St. 89.) But this power of conviction without a jury cannot be extended to other classes of cases than those in which it has ordinarily and customarily been employed. (See *Wynehamer v. People*, 13 N. Y. 378; *State v. Glenn*, 54 Md. 572; *Callan v. Wilson*, 127 U. S. 540; see also 42 & 43 Vict. c. 49.)

plainly tend to create a universal disregard of their authority. The principal instances, of either sort, that have been usually punishable by attachment, are chiefly of the following kinds. 1. Those committed by inferior judges and magistrates; by acting unjustly, oppressively, or irregularly, in administering those portions of justice which are intrusted to their distribution: or by disobeying the king's writs issuing out of the superior courts, by proceeding in a cause after it is put a stop to or removed by writ of prohibition, *certiorari*, error, *supersedeas*, and the like. For, as the king's superior courts (and especially the courts of the king's bench) have a general superintendence over all inferior jurisdictions, any corrupt or iniquitous practices of subordinate judges are contempts of that superintending authority, whose duty it is to keep them within the bounds of justice. 2. Those committed by sheriffs, bailiffs, jailers, and other officers of the court by abusing the process of the law, or deceiving the parties, by any acts of oppression, extortion, collusive behavior, or culpable neglect of duty. 3. Those committed by attorneys and solicitors, who are also officers of the respective courts: by gross instances of fraud and corruption, injustice to their clients, or other dishonest practice. For the malpractice of the officers reflects some dishonor on their employers: and, if frequent or unpunished, creates among the people a disgust against the courts themselves. 4. Those committed by jurymen, in collateral matters relating to the discharge of their office; such as making default, when summoned; refusing to be sworn, or to give any verdict; eating or drinking without the leave of the court, and especially at the cost of either party; and other misbehavior or irregularities of a similar kind: but not in the mere exercise of their judicial capacities, as by giving a false or erroneous verdict. 5. Those committed by witnesses: by making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn. 6. Those committed by parties to any suit, or proceeding before the court: as by disobedience to any rule or order, made in the progress of a cause; by non-payment of costs awarded by the court upon a motion; or, by non-observance of awards duly made by arbitrators or umpires, after having entered into a rule for submitting to such determination. Indeed the attachment for most of this species of contempts, and especially for non-payment of costs and non-performance of awards, is to be looked upon rather as

a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. 7. Those committed by any other persons under the degree of a peer : and even by peers themselves, when enormous and accompanied with violence, such as forcible *rescous* and the like ; or when they import a disobedience to the king's great prerogative writs of prohibition, *habeas corpus*, and the rest. Some of these contempts may arise in the face of the court, as by rude and contumelious behavior ; by obstinacy, perverseness, or prevarication : by breach of the peace, or any wilful disturbance whatever : others in the absence of the party ; as by disobeying or treating with disrespect the king's writ, or the rules or process of the court ; by perverting such writ or process to the purposes of private malice, extortion, or injustice ; by speaking or writing contemptuously of the court or judges, acting in their judicial capacity ; by printing false accounts (or even true ones without proper permission) of causes then depending in judgment ; and by anything, in short, that demonstrates a gross want of that regard and respect, which when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people.² The process of attachment, for these and the like contempts, must necessarily be as ancient as the laws themselves. For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power therefore in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly we find it actually exercised as early as the annals of our law extend.

If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any farther proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of

² There are statutes in force, in the several American States, providing for the punishment of criminal contempts before courts of justice. Such acts in violation of judicial authority and prerogatives, and in hindrance of the regular administration of justice, are usually denominated contempts, as are described and enumerated in the text. (See 128 U. S. 289 ; 131 U. S. 267.)

the party or the testimony of others, if the judges upon *affidavit* see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him; or, in very flagrant instances of contempt, the attachment issues in the first instance; as it also does, if no sufficient cause be shown to discharge, and thereupon the court confirms, and makes absolute, the original rule. This process of attachment is merely intended to bring the party into court: and, when there, he must either stand committed, or put in bail, in order to answer upon oath to such *interrogatories* as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation, and must by the course of the court be exhibited within the first four days: and, if any of the interrogatories is improper, the defendant may refuse to answer it, and move the court to have it struck out. If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury. If he confesses the contempt, the court will proceed to correct him by fine, or imprisonment, or both, and sometimes by a corporal or infamous punishment. But if he wilfully and obstinately refuses to answer, or answers in an evasive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court.

It cannot have escaped the attention of the reader, that this method of making the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the common law in any other instance; and seems indeed to have been derived to the courts of king's bench and common pleas through the medium of the courts of equity. For the whole process of the courts of equity, in the several stages of a cause, and finally to enforce their decrees, was, till the introduction of sequestrations, in the nature of a process of contempt; acting only *in personam* and not *in rem*. And there, after the party in contempt has answered the interrogatories, such his answer may be contradicted and disproved by *affidavits* of the adverse party: whereas, in the courts of law, the admission of the party to purge himself by oath is more favorable to his liberty, though perhaps not less dangerous to his conscience; for, if he clears himself by his answers, the complaint is totally dismissed. And, with regard to

this singular mode of trial, thus admitted in this one particular instance, I shall only for the present observe, that as the process by attachment in general appears to be extremely ancient, and has in more modern times been recognized, approved, and confirmed by several express acts of parliament, so the method of examining the delinquent himself upon oath with regard to the contempt alleged, is at least of as high antiquity, and by long and immemorial usage is now become the law of the land.

CHAPTER XIX.

[BL. COMM.—BOOK IV. CH. XXI.]

Of Arrests.

WE are now to consider the regular and ordinary method of proceeding in the courts of criminal jurisdiction; which may be distributed under twelve general heads, following each other in a progressive order, *viz.*: 1. Arrest; 2. Commitment, and bail; 3. Prosecution; 4. Process; 5. Arraignment, and its incidents; 6. Plea, and issue; 7. Trial, and conviction; 8. Clergy; 9. Judgment, and its consequences; 10. Reversal of Judgment; 11. Reprieve, or pardon; 12. Execution;—all of which will be discussed in the subsequent part of this book.

First, then, of an *arrest*; which is the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime. To this arrest all persons whatsoever are, without distinction equally liable in all criminal cases: but no man is to be arrested, unless charged with such a crime, as will at least justify holding him to bail when taken. And, in general, an arrest may be made four ways: 1. By warrant; 2. By an officer without warrant; 3. By a private person also without a warrant; 4. By a hue and cry.

1. A warrant may be granted in extraordinary cases by the privy council, or secretaries of state; but ordinarily by justices of the peace.¹ This they may do in any cases where they

¹ The necessary contents of a warrant, the mode of obtaining its issue,

have a jurisdiction over the offence ; in order to compel the person accused to appear before them : for it would be absurd to give them power to examine an offender, unless they had also a power to compel him to attend, and submit to such examination. And this extends undoubtedly to all treasons, felonies, and breaches of the peace ; and also to all such offences as they have power to punish by statute. Sir Edward Coke, indeed, hath laid it down that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion ; no, not even till an indictment be actually found : and the contrary practice is by others held to be grounded rather upon connivance than the express rule of law ; though now by long custom established. A doctrine which would in most cases give a loose to felons to escape without punishment ; and therefore Sir Matthew Hale hath combated it with invincible authority and strength of reason : maintaining,

1. That a justice of the peace hath power to issue a warrant to apprehend a person *accused* of felony, though not yet *indicted* ; and,
2. That he may also issue a warrant to apprehend a person *suspected* of felony, though the original suspicion be not in himself, but in the party that prays his warrant ; because he is a competent judge of the probability offered to him of such suspicion.

But in both cases it is fitting to examine upon oath the party requiring a warrant as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted ; as also to *prove* the cause and probability of suspecting the party against whom the warrant is prayed. This warrant ought to be under the hand and seal of the justice, should set forth the time and place of making, and the cause for which it is made, and should be directed to the constable or other peace-officer (or, it may be, to any private person by name), requiring him to bring the party either generally before *any* justice of the peace for the county, or only before the justice who granted it ;

the method and time of execution and return, etc., are usually prescribed in this country by statute, and such statutory provisions must be strictly followed. There are no differences of material importance between the usual practice in this country, and that stated in the text. It is provided by the United States Constitution, that “no warrants shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” (Am’ts, Art. 4.)

the warrant in the latter case being called a *special* warrant. A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty ; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all persons, guilty of a crime therein specified, is no legal warrant : for the point, upon which its authority rests, is a fact to be decided on a subsequent trial ; namely, whether the person apprehended thereupon, be really guilty or not. It is therefore in fact *no* warrant at all ; for it will not justify the officer who acts under it : whereas a warrant properly penned (even though the magistrate who issues it should exceed his jurisdiction), will by statute 24 Geo. II., ch. 44, at all events indemnify the officer who executes the same ministerially. And when a warrant is received by the officer he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends. A warrant from the chief, or other, justice of the court of king's bench extends all over the kingdom : and is *tested*, or *dated*, *England* ; not *Oxfordshire*, *Berks*, or other particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be backed, that is, signed by a justice of the peace in another, as Middlesex, before it can be executed there. Formerly, regularly speaking, there ought to have been a fresh warrant in every fresh county : but the practice of backing warrants had long prevailed without law, and was at last authorized by statutes 23 Geo. II., ch. 26, and 24 Geo. II., ch. 55. And now, by statute 13 Geo. III., ch. 31, any warrant for apprehending an English offender, who may have escaped into Scotland, and *vice versa*, may be endorsed and executed by the local magistrates, and the offender conveyed back to that part of the united kingdom, in which such offence was committed.

2. Arrest by *officers without warrant*, may be executed, 1. By a justice of the peace ; who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence. 2. The sheriff, and, 3. The coroner, may apprehend any felon within the county without warrant. 4. The constable, of whose office we formerly spoke, hath great original and inherent authority with regard to arrests. He may, without warrant, arrest any one for a breach

of the peace, committed in his view, and carry him before a justice of the peace. And, in case of felony *actually* committed, or a dangerous wounding, whereby felony is like to ensue, he may upon probable suspicion arrest the felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken; and, if he or his assistants be killed in attempting such arrests, it is murder in all concerned. 5. Watchmen, either those appointed by the statute of Winchester, 13 Edw. I., ch. 4, to keep watch and ward in all towns from sun-setting to sun-rising, or such as are mere assistants to the constable, may *virtute officii* arrest all offenders and particularly night-walkers, and commit them to custody till the morning.

3. Any private person (and *a fortiori* a peace-officer) that is present when any felony is committed, is bound by the law to arrest the felon, on pain of fine and imprisonment, if he escapes through the negligence of the standers-by. And they may justify breaking open the doors upon following such felon; and if *they kill him*, provided he cannot be otherwise taken, it is justifiable; though if *they are killed* in endeavoring to make such arrest, it is murder. Upon probable suspicion also a private person may arrest the felon, or other person so suspected.² But he cannot justify breaking open doors to do it; and if either party kill the other in the attempt, it is manslaughter, and no more. It is no more, because there is no malicious design to kill: but it amounts to so much, because it would be of most pernicious consequence, if, under pretence of suspecting felony, any private person might break open a house, or kill another;

² There is this important difference between the right of an officer and of a private person to arrest for felony without warrant; that an officer will be justified, though the person taken into custody be innocent, if he acted upon a reasonable suspicion that a felony had actually been committed, though none was committed in fact; while a private person will only be justified, under similar circumstances, in case a felony had actually been committed by some one, (though not by the person arrested), and he acted upon reasonable suspicion that the prisoner was the guilty person. (*Holley v. Mix*, 3 Wend. 350.) Both officers and private persons may arrest without warrant for a breach of the peace committed in their presence, but not in other cases of misdemeanor, unless authority be specifically given by statute. (*Taylor v. Strong*, 3 Wend. 384; *Burns v. Erben*, 40 N. Y. 463; *Phillips v. Trull*, 11 Johns. 486.) But these common law rules have been changed in some States by statute.

The old doctrine of arrest by "hue and cry," is now of little more than historical interest.

and also because such arrest upon suspicion is barely *permitted* by the law, and not *enjoined*, as in the case of those who are present when a felony is committed.

4. There is yet another species of arrest, wherein both officers and private men are concerned, and that is, upon a *hue and cry*, raised upon a felony committed. A hue (from *huer*, to shout, and cry), *hutesium et clamor*, is the old common law process of pursuing, with horn and with voice, all felons and such as have dangerously wounded another. Hue and cry may be raised either by precept of a justice of the peace, or by a peace-officer, or by any private man that knows of a felony. The party raising it must acquaint the constable of the vill with all the circumstances which he knows of the felony, and the person of the felon ; and thereupon the constable is to search his own town, and raise all the neighboring vills, and make pursuit with horse and foot ; and in the prosecution of such hue and cry the constable and his attendants have the same powers, protection, and indemnification, as if acting under a warrant of a justice of the peace. But if a man wantonly or maliciously raises a hue and cry, without cause, he shall be severely punished as a disturber of the public peace.

In order to encourage farther the apprehending of certain felons, rewards and immunities are bestowed on such as bring them to justice, by divers acts of parliament.

CHAPTER XX.

[BL. COMM.—BOOK IV. CH. XXII.]

Of Commitment and Bail.

WHEN a delinquent is arrested by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a justice of the peace : and how he is there to be treated, I shall next show, under the second head, of *commitment and bail*.

The justice before whom such prisoner is brought, is bound immediately to *examine* the circumstances of the crime alleged;

and to this end by statute 2 & 3 Ph. & M., ch. 10, he is to take in writing the examination of such prisoner, and the information of those who bring him: which Mr. Lambard observes, was the first warrant given for the examination of a felon in the English law. For at the common law *nemo tenebatur prodere seipsum*: and his fault was not to be wrung out of himself, but rather to be discovered by other means and other men. If upon this inquiry it manifestly appears, that either no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison, or give bail: that is, put in securities for his appearance, to answer the charge against him. This commitment, therefore, being only for safe custody, wherever bail will answer the same intention, it ought to be taken; as in most of the inferior crimes; but in felonies, and other offences of a capital nature, no bail can be a security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit to save his own life? and what satisfaction or indemnity is it to the public, to seize the effects of them who have bailed a murderer, if the murderer himself be suffered to escape with impunity? What the nature of bail is, hath been shown in the preceding book, *viz.*, a delivery or bailment, of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance; he being supposed to continue in their friendly custody, instead of going to jail. In civil cases we have seen that every defendant is bailable; but in criminal matters it is otherwise. Let us, therefore, inquire, in what cases the party accused ought, or ought not, to be admitted to bail.

And, first, to refuse or delay to bail any person bailable, is an offence against the liberty of the subject, in any magistrate by the common law, as well as by the statute Westm. 1, 3 Edw. I., ch. 15, and the *habeas corpus* act, 31 Car. II., ch. 2. And, lest the intention of the law should be frustrated by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by statute 1 W. & M. stat. 2. ch. 1, that excessive bail ought not to be required; though what bail should be called excessive, must be left to the courts, on considering the circumstances of the case, to determine. And, on the other hand, if the magistrate takes insufficient bail, he is liable

to be fined, if the criminal doth not appear. Bail may be taken either in court, or in some particular cases by the sheriff, coroner, or other magistrate; but most usually by the justices of the peace. Regularly, in all offences either against the common law or act of parliament, that are below felony, the offender ought to be admitted to bail, unless it be prohibited by some special act of parliament. In order, therefore, more precisely to ascertain what offences *are* bailable,

Let us next see, who may *not* be admitted to bail, or what offences are *not* bailable. And here I shall not consider any one of those cases in which bail is ousted by statute, from prisoners *convicted* of particular offences: for then such imprisonment without bail is part of their sentence and punishment. But, where the imprisonment is only for safe custody *before* the conviction, and not for punishment *afterwards*, in such cases bail is ousted or taken away, wherever the offence is of a very enormous nature: for then the public is entitled to demand nothing less than the highest security that can be given, *viz.*, the body of the accused; in order to insure that justice shall be done upon him, if guilty. Such persons, therefore, as the author of the Mirror observes, have no other sureties but the four walls of the prison. By the ancient common law, before and since the conquest, all felonies were bailable, till murder was excepted by statute: so that persons might be admitted to bail before conviction almost in every case. But the statute Westm. 1, 3 Edw. I., ch. 15, takes away the power of bailing in treason, and in divers instances of felony. The statutes 23 Hen. VI., ch. 9, and 1 & 2 Ph. & Mar. ch. 13, give further regulations in this matter; and upon the whole we may collect, that no justice of the peace can bail, 1. Upon an accusation of treason: nor, 2. Of murder: nor, 3. In case of manslaughter, if the prisoner be clearly the slayer, and not barely suspected to be so; or if any indictment be found against him: nor, 4. Such as, being committed for felony, have broken prison; because it not only carries a presumption of guilt, but is also superadding one felony to another: 5. Persons outlawed: 6. Such as have abjured the realm: 7. Persons charged with arson. Others are of a dubious nature; as, 8. Thieves openly defamed and known: 9. Persons charged with other felonies, or manifest and enormous offences, not being of good fame: and 10. Accessories

to felony, that labor under the same want of reputation. These seem to be in the discretion of the justices, whether bailable or not. The last class are such as *must* be bailed upon offering sufficient surety ; as, 11. Persons of good fame, charged with a bare suspicion of manslaughter, or other inferior homicide ; 12. Such persons, being charged with petit larceny, or any felony not before specified : or, 13. With being accessory to any felony. Lastly, it is agreed that the court of king's bench (or any judge thereof in time of vacation) may bail for any crime whatsoever, be it treason, murder, or any other offence, according to the circumstance of the case. And herein the wisdom of the law is very manifest. To allow bail to be taken commonly for such enormous crimes, would greatly tend to elude the public justice : and yet there are cases, though they rarely happen, in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offence. The law has therefore provided one court, and only one, which has a discretionary power of bailing in any case : except only, even to this high jurisdiction, and of course to all inferior ones, such persons as are committed by either house of parliament, so long as the session lasts : or such as are committed for contempts by any of the king's superior courts of justice.

Upon the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county jail by the *mittimus* of the justice, or warrant under his hand and seal, containing the cause of his commitment : there to abide till delivered by due course of law. But this imprisonment, as has been said, is only for safe custody, and not for punishment ; therefore in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity : and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only ; though what are so requisite, must too often be left to the discretion of the jailers ; who are frequently a merciless race of men, and, by being conversant in scenes of misery, steeled against any tender sensation.¹

¹ The subject of commitment and bail is peculiarly a matter of statutory regulation in this country ; but the general methods of procedure are not materially different from those above stated. It is provided by the United State Constitution, and by the State constitutions, that "excessive bail shall

CHAPTER XXI.

[BL. COMM.—BOOK IV. CH. XXIII.]

Of the Several Modes of Prosecution.

THE next step towards the punishment of offenders is their prosecution or the manner of their formal accusation. And this is either upon a previous finding of the fact by an inquest or grand jury ; or without such previous finding. The former way is either by *presentment* or *indictment*.

I. A presentment, *generally* taken, is a very comprehensive term ; including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury. A presentment, *properly* speaking, is the notice taken by a grand jury of any offence from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king : as the presentment of a nuisance, a libel and the like ; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it. An inquisition of office is the act of a jury summoned by the proper officer to inquire of matters relating to the crown, upon evidence laid before them. Some of these are in themselves convictions, and cannot afterwards be traversed or denied ; and therefore the inquest or jury ought to hear all that can be alleged on both sides. Of this nature are all inquisitions of *felo de se* ; of flight in persons accused of felony ; of deodands, and the like. Other inquisitions may be afterwards traversed and examined ; as particularly the coroner's inquisition of the death of a man, when

not be required," but the determination of the proper amount in any particular case is left largely to the discretion of the court. An act of Congress provides that, upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, a circuit judge, or a judge of the district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence and the usages of law. (U. S. Rev. Stat. §§ 1015, 1016.) In the several States, authority to admit to bail in cases of felony is usually reserved to the superior courts or magistrates.

it finds any one guilty of homicide ; for in such cases the offender so presented must be arraigned upon this inquisition, and may dispute the truth of it ; which brings it to a kind of indictment, the most usual and effectual means of prosecution, and into which we will therefore inquire a little more minutely.

II. An *indictment* is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of *oyer* and *terminer*, and of general gaol-delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things, which on the part of our lord the king shall then and there be commanded them.¹ They ought to be freeholders, but to what amount is uncertain : which seems to be *casus omissus*, and as proper to be supplied by the legislature as the qualifications of the petit jury, which were formerly equally vague and uncertain, but are now settled by several acts of parliament. However, they are usually gentlemen of the best figure in the county. As many as appear upon this panel are sworn upon the grand jury, to the amount of twelve at the least, and not more than twenty-three : that twelve may be a majority.

This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the the suit of any private prosecutor ; and they are only to hear

¹ In a few of the American States, the number of members requisite to form a grand jury has been changed by statute. Thus in New York it is provided that there shall not be more than twenty-three, nor less than sixteen persons sworn on any grand jury ; and in Massachusetts the number varies from thirteen to twenty-three. But the rule seems to be universal, that the concurrence of twelve only is necessary for the finding of an indictment.

This method of prosecution has been deemed of such fundamental importance to the liberty of the citizen, that it has been provided in the United States Constitution, and in the constitutions of the several States, that no man shall be tried for a criminal offense (except for crimes of an inferior grade, or such as occur among the military and naval forces), unless on presentment or indictment by a grand jury. After an indictment is found, the cause is tried before a petit jury, which consists of twelve men, whose verdict must be unanimous. (*In re Bain*, 121 U. S. 1 ; *Mackin v. U. S.*, 117 U. S. 348.)

evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment so far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine that might be applied to very oppressive purposes.

The grand jury are sworn to inquire, only for the body of the county, *pro corpore comitatus*; and therefore they cannot regularly inquire of a fact done out of that county for which they are sworn, unless particularly enabled by an act of parliament. In general, all offences must be inquired into as well as tried in the county where the fact is committed. Yet if larceny be committed in one county, and the goods carried into another, the offender may be indicted in either; for the offence is complete in both. Or he may be indicted in England, for larceny in Scotland, and carrying the goods with him into England, or *vice versa*; or for receiving in one part of the United Kingdom goods that have been stolen in another. But for robbery, burglary, and the like, he can only be indicted where the fact was actually committed; for though the carrying away and keeping of the goods is a continuation of the original taking, and is therefore larceny in the second county, yet it is not a robbery or burglary in that jurisdiction.

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to indorse on the back of the bill, "*ignoramus*;" or, we know nothing of it: intimating that though the facts might possibly be true, that truth did not appear to them: but now, they assert in English more absolutely, "not a true bill;" or (which is the better way) "not found;" and then the party is discharged without further answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then indorse upon it, "a true bill;" anciently, "*billa vera*." The indictment is then said to be found, and the party stands indicted. But to find a bill there must at least twelve of the jury agree: for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the

king of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbors: that is, by twelve at least of the grand jury, in the first place, assenting to the accusation: and afterwards, by the whole petit jury, of twelve more, finding him guilty, upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree. And the indictment, when so found, is publicly delivered into court.

Indictments must have a precise and sufficient certainty. By statute 1 Hen. V., ch. 5, all indictments must set forth the christian name, surname, and addition of the state, and degree, mystery, town or place, and the county of the offender: and all this to identify his *person*. The *time*, and *place*, are also to be ascertained by naming the day, and township, in which the fact was committed: though a mistake in these points is in general not held to be material, provided the *time* be laid previous to the finding of the indictment, and the *place* to be within the jurisdiction of the court; unless where the place is laid, not merely as a *venue*, but as part of the description of the fact. But sometimes the *time* may be very material, where there is any situation in point of time assigned for the prosecution of offenders: as by the statute 7 Will. III., ch. 3, which enacts, that no prosecution shall be had for any of the treasons or misprisions therein mentioned (except an assassination designed or attempted on the person of the king), unless the bill of indictment be found within three years after the offence committed:² and in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given. The offence itself must also be set forth with clearness and certainty; and in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it. Thus, in treason, the facts must be laid to be done "treasonably and against his

² Statutes of limitation have been passed in a number of the States, in regard to the trial of criminal offenses. Thus in New York it is provided that indictments for murder may be found at any time after the death of the person killed, but in all other cases they must be found within five years after the commission of the offense; but the time during which the defendant resides without the State, is not estimated as part of the five years. (Penal Code §§ 141-145.)

allegiance;" anciently, "*proditorie et contra ligeantiæ suæ debittum*:" else the indictment is void. In indictments for murder, it is necessary to say that the party indicted "murdered," not "killed," or "slew," the other; which, till the late statute was expressed in Latin by the word "*murdravit*." In all indictments for felonies, the adverb "feloniously," "*felonice*," must be used; and for burglaries also, "*burglariter*," or in English, "burglariously:" and all these to ascertain the intent. In rapes, the word "*rapuit*," or "ravished," is necessary, and must not be expressed by any periphrasis; in order to render the crime certain. So in larcenies also, the words "*felonice cepit et asportavit*, feloniously took and carried away," are necessary to every indictment; for these only can express the very offence. Also in indictments for murder, the length and depth of the wound should in general be expressed, in order that it may appear to the court to have been of a mortal nature: but if it goes through the body, then its dimensions are immaterial, for that is apparently sufficient to have been the cause of the death. Also, where a limb, or the like, is absolutely cut off, there such description is impossible. Lastly, in indictments, the *value* of the thing, which is the subject or instrument of the offence, must sometimes be expressed. In indictments for larcenies this is necessary, that it may appear whether it be grand or petit larceny; and whether entitled or not to the benefit of clergy; in homicide of all sorts it is necessary; as the weapon with which it is committed is forfeited to the king as a deodand.³

The remaining method of prosecution is without any previous finding by a jury, to fix the authoritative stamp of verisimilitude upon the accusation. The only species of proceeding at the suit of the king, without a previous indictment or presentment by a grand jury, now seems to be that of *information*.

III. Informations are of two sorts: first, those which are partly at the suit of the king and partly at that of a subject; and secondly, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a

³ These various rules of the common-law, in regard to the county in which trials for certain offenses are to be had, and in regard to the necessary contents of an indictment, have been somewhat changed or modified by statute, both in England and in this country; but, in most respects, the present procedure is similar to that described in the text.

penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer ; and are a sort of *qui tam* actions (the nature of which was explained in a former book), only carried on by a criminal instead of a civil process.

The informations that are exhibited in the name of the king alone, are also of two kinds; first, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the attorney-general; secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer ; and they are filed by the king's coroner and attorney in the court of king's bench, usually called the master of the crown-office, who is for this purpose the standing officer of the public. The objects of the king's own prosecutions, filed *ex officio* by his own attorney-general, are properly such enormous misdemeanors, as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal: which power, thus necessary, not only to the ease and safety, but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of informations, filed by the master of the crown-office upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the attorney-general), but which, on account of their magnitude or pernicious example, deserve the most public animadversion. And when an information is filed, either thus, or by the attorney-general *ex officio*, it must be tried by a petit jury of the county where the offence arises: after which, if the defendant be found guilty, the court must be resorted to for his punishment.

There can be no doubt but that this mode of prosecution by information (or suggestion), filed on record by the king's attorney-general, or by his coroner or master of the crown-office in the

court of king's bench, is as ancient as the common law itself. But these informations (of every kind) are confined by the constitutional law to mere misdemeanors only: for, whenever any capital offence is charged, the same law requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer it. The oppressive use of them, in the times preceding the revolution, occasioned a struggle, soon after the accession of King William, to procure a declaration of their illegality by the judgment of the court of king's bench. But Sir John Holt, who then presided there, and all the judges, were clearly of opinion, that this proceeding was grounded on the common law, and could not be then impeached. And, in a few years afterwards, a more temperate remedy was applied in parliament, by statute 4 and 5 W. & M., ch. 18, which enacts, that the clerk of the crown shall not file any information without express direction from the court of king's bench: and that every prosecutor, permitted to promote such information, shall give security by a recognizance of twenty pounds (which now seems to be too small a sum) to prosecute the same with effect; and to pay costs to the defendant, in case he be acquitted thereon, unless the judge, who tries the information, shall certify there was reasonable cause for filing it; and, at all events, to pay costs, unless the information shall be tried within a year after issue joined. But there is a proviso in this act, that it shall not extend to any other informations than those which are exhibited by the master of the crown-office: and, consequently, informations at the king's own suit, filed by his attorney-general, are no way restrained thereby.

There is one species of informations, still farther regulated by statute 9 Ann., ch. 20., *viz.*, those in the nature of a writ of *quo warranto*; which was shown, in the preceding book, to be a remedy given to the crown against such as had usurped or intruded into any office or franchise. The modern information tends to the same purpose as the ancient writ, being generally made use of to try the civil rights of such franchises: though it is commenced in the same manner as other informations are, by leave of the court, or at the will of the attorney-general: being properly a criminal prosecution, in order to fine the defendant for his usurpation, as well as to oust him from his office; yet usually considered at present as merely a civil proceeding.⁴

⁴ In this country, a few of the States have retained the English practice

These are the several methods of prosecution instituted by the laws of England for the punishment of offences; of which that by indictment is the most general. I shall therefore confine my subsequent observations principally to this method of prosecution; remarking by the way the most material variations that may arise, from the method of proceeding by information.

CHAPTER XXII.

[BL. COMM.—BOOK IV. CH. XXIV.]

Of Process upon an Indictment.

WE are next, in the fourth place, to inquire into the manner of issuing *process*, after indictment found, to bring in the accused to answer it. We have hitherto supposed the offender to be in custody before the finding of the indictment; in which case he is immediately (or as soon as convenience permits) to be arraigned thereon. But if he hath fled, or secretes himself, in capital cases; or hath not, in smaller misdemeanors, been bound over to appear at the assizes or sessions, still an indictment may be preferred against him in his absence; since, were he present, he could not be heard before the grand jury against it. And, if it be found, then process must issue to bring him into court; for the indictment cannot be tried, unless he personally appears: according to the rules of equity in all cases, and the express provision of statute 28 Edw. III., ch. 3, in capital ones, that no

of prosecution by information, though with various statutory modifications. Thus informations have been employed for offenses of the grade of misdemeanors, but not for felonies, in Indiana, New Hampshire, Massachusetts, Connecticut, and some other States. They are usually filed by the attorney-general of the State. But this procedure is much less common than prosecution by indictment. In some of the States, proceedings by information are not permissible where an indictment lies. In the Federal courts, informations are sometimes employed in cases of illegal exportation of goods, smuggling and similar offenses. But, by the United States Constitution, offenses which are capital or infamous can only be prosecuted by indictment (See 114 U. S. 417; 110 U. S. 516; 60 Mich. 113; 87 Ind. 97.)

man shall be put to death, without being brought to answer by due process of law.

The proper process on an indictment for any petit misdemeanor, or on a penal statute, is a writ of *venire facias*, which is in the nature of a summons to cause the party to appear. And if by the return to such *venire* it appears that the party hath lands in the county whereby he may be distrained, then a *distress infinite* shall be issued from time to time till he appears. But if the sheriff returns that he hath no lands in his bailiwick, (then upon his non-appearance), a writ of *capias* shall issue, which commands the sheriff to take his body, and have him at the next assizes; and if he cannot be taken upon the first *capias*, a second and third shall issue, called an *alias*, and a *pluries capias*. But, on indictments for treason or felony, a *capias* is the first process: and, for treason or homicide, only one shall be allowed to issue, or two in the case of other felonies, by statute 25 Edw. III., ch. 14, though the usage is to issue only one in any felony; the provisions of this statute being in most cases found impracticable. And so, in the case of misdemeanors, it is now the usual practice for any judge of the court of king's bench, upon certificate of an indictment found, to award a writ of *capias* immediately, in order to bring in the defendant. But if he absconds, and it is thought proper to pursue him to an outlawry, then a greater exactness is necessary. For, in such case, after the several writs have issued in a regular number, according to the nature of the respective crimes, without any effect, the offender shall be put in the *exigent* in order to his outlawry: that is, he shall be exacted, proclaimed, or required to surrender, at five county courts; and if he be returned *quinto exactus*, and does not appear at the fifth exaction or requisition, then he is adjudged to be *outlawed*, or put out of the protection of the law: so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise.

The punishment for outlawries upon indictments for misdemeanors, is the same as for outlawries upon civil actions (of which, and the previous process by writs of *capias*, *exigi facias*, and *proclamation*, we spoke in the preceding book); viz., forfeiture of goods and chattels. But an outlawry in treason or felony amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been

found guilty by his country. His life is however still under the protection of the law, as hath formerly been observed : so that though anciently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head like a wolf, by any one that should meet him ; because, having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him : yet now, to avoid such inhumanity, it is holden that no man is entitled to kill him wantonly or wilfully : but in so doing is guilty of murder, unless it happens in the endeavor to apprehend him. For any person may arrest an outlaw on a criminal prosecution, either of his own head, or by writ or warrant of *capias utlagatum*, in order to bring him to execution. But such outlawry may be frequently reversed by writ of error : the proceedings therein being (as it is fit they should be) exceedingly nice and circumstantial ; and, if any single minute point be omitted or misconducted, the whole outlawry is illegal, and may be reversed : upon which reversal the party accused is admitted to plead to, and defend himself against, the indictment.¹

Thus much for process to bring in the offender after indictment found ; during which stage of the prosecution it is, that writs of *certiorari facias* are usually had, though they may be had at any time before trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the court of king's bench ; which is the sovereign ordinary court of justice in causes criminal. And this is frequently done for one of these four purposes ; either, 1. To consider and determine the validity of appeals or indictments and the proceedings thereon ; and to quash or confirm them as there is cause : or, 2. Where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed, in order to have the prisoner or defendant tried at the bar of the court of king's bench, or before the justices of *nisi prius* ; or, 3. It is so removed, in order to plead the king's pardon there : or, 4. To issue process of outlawry against

¹ Outlawry, in criminal cases, has generally been abolished in this country ; though, in some States, judgment of outlawry may be rendered in cases of treason. Practically, however, it may be said to be entirely unknown.

Provisions in regard to the issue of process after indictment, and in reference to writs of *certiorari*, will be found in the statute-books of the several States.

the offender, in those counties or places where the process of the inferior judges will not reach him. Such writ of *certiorari*, when issued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless the court of king's bench remands the record to the court below, to be there tried and determined. A *certiorari* may be granted at the instance of either the prosecutor or the defendant: the former as a matter of right, the latter as a matter of discretion; and therefore it is seldom granted to remove indictments from the justices of gaol-delivery, or after issue joined or confession of the fact in any of the courts below.

CHAPTER XXIII.

[BL. COMM.—BOOK IV. CH. XXV.]

Of Arraignment and its Incidents.

WHEN the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be *arraigned* thereon; which is the fifth stage of criminal prosecution.

To arraign, is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment. The prisoner is to be called to the bar by his name; and it is laid down in our ancient books, that, though under an indictment of the highest nature, he must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape, and then he may be secured with irons. But yet in *Layer's case*, A.D. 1722, a difference was taken between the time of arraignment and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment.

When he is brought to the bar, he is called upon by name to hold up his hand : which, though it may seem a trifling circumstance, yet is of this importance, that by the holding up of his hand *constat de persona*, and he owns himself to be of that name by which he is called. However, it is not an indispensable ceremony ; for, being calculated merely for the purpose of identifying the person, any other acknowledgment will answer the purpose as well ; therefore, if the prisoner obstinately and contemptuously refuses to hold up his hand, but confesses he is the person named, it is fully sufficient.

Then the indictment is to be read to him distinctly in the English tongue (which was law, even while all other proceedings were in Latin), that he may fully understand his charge. After which it is to be demanded of him, whether he be guilty of the crime whereof he stands indicted, or not guilty.

When a criminal is arraigned, he either *stands mute*, or *confesses* the fact ; which circumstances we may call *incidents* to arraignment : or else he *pleads* to the indictment, which is to be considered as the next stage of proceedings. But, first, let us observe these incidents to the arraignment, of standing mute, or confession.

I. Regularly a prisoner is said to stand mute, when, being arraigned for treason, or felony, he either, 1. Makes no answer at all ; or, 2. Answers foreign to the purpose, or with such matter as is not allowable ; and will not answer otherwise : or, 3. Upon having pleaded not guilty, refuses to put himself upon the country. If he says nothing, the court ought *ex officio* to impanel a jury to inquire whether he stands obstinately mute, or whether he be dumb *ex visitatione Dei*. If the latter appears to be the case, the judges of the court (who are to be of counsel for the prisoner, and to see that he hath law and justice) shall proceed to the trial, and examine all points as if he had pleaded not guilty. But whether judgment of death can be given against such a prisoner who hath never pleaded, and can say nothing in arrest of judgment, is a point yet undetermined.

If he be found to be obstinately mute (which a prisoner hath been held to be that hath cut out his own tongue), then, if it be on an indictment of high treason, it hath long been clearly settled, that standing mute is an equivalent to a conviction, and he shall receive the same judgment and execution. And as in this

the highest crime, so also in the lowest species of felony, *viz.*, in petit larceny, and in all misdemeanors, standing mute hath always been equivalent to conviction. But upon indictments for other felonies, or petit treason, the prisoner was not, by the ancient law, looked upon as convicted, so as to receive judgment for the felony ; but should, for his obstinacy, have received the terrible sentence of *penance*, or *peine* (which was probably nothing more than a corrupted abbreviation of *prisone forte et dure*).

Before this was pronounced the prisoner had not only *trina admonitio*, but also a respite for a few hours, and the sentence was distinctly read to him, that he might know his danger ; and, after all, if he continued obstinate, and his offence was clergyable, he had the benefit of his clergy allowed him, even though he was too stubborn to pray it. Thus tender was the law of inflicting this dreadful punishment ; but if no other means could prevail, and the prisoner (when charged with a capital felony) continued stubbornly mute, the judgment was then given against him without any distinction of sex or degree.

The English judgment of penance for standing mute was as follows : that the prisoner be remanded to the prison from whence he came ; and put into a low, dark chamber ; and there be laid on his back, on the bare floor, naked, unless where decency forbids ; that there be placed upon his body as great a weight of iron as he could bear, and more ; that he have no sustenance, save only, on the first day, three morsels of the worst bread ; and on the second day, three draughts of standing water, that should be nearest to the prison-door ; and in this situation this should be alternately his daily diet *till he died* or (as anciently the judgment ran) *till he answered*.

The uncertainty of its original, the doubts that were conceived of its legality, and the repugnance of its theory (for it was rarely carried into practice) to the humanity of the laws of England, all concurred to require a legislative abolition of this cruel process, and a restitution of the ancient common law : whereby the standing mute in felony, as well as in treason and in trespass, amounted to a confession of the charge. And very lately to the honor of our laws, it hath been enacted by statute 12 Geo. III., ch. 20, that every person who being arraigned for felony and piracy, shall stand mute or not answer directly to the offence, shall be

convicted of the same, and the same judgment and execution (with all their consequences in every respect) shall be thereupon awarded, as if the person had been convicted by verdict or confession of the crime. And thus much for the demeanor of a prisoner upon his arraignment, by standing mute; which now, in all cases, amounts to a constructive confession.¹

II. The other incident to arraignments, exclusive of the plea, is the prisoner's actual *confession* of the indictment. Upon a simple and plain confession, the court hath nothing to do but to award judgment: but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it, and plead to the indictment.

CHAPTER XXIV.

[BL. COMM.—BOOK IV. CH. XXVI.]

Of Plea, and Issue.

WE are now to consider the plea of the prisoner, or defensive matter alleged by him on his arraignment, if he does not confess or stand mute. This is either, 1. A plea to the jurisdiction; 2. A demurrer; 3. A plea in abatement; 4. A special plea in bar; or, 5. The general issue.

I. A plea to the *jurisdiction*, is where an indictment is taken before a court that hath no cognizance of the offence; as if a man be indicted for a rape at the sheriff's tourn, or for treason at the quarter sessions; in these, or similar cases, he may except to the jurisdiction of the court, without answering at all to the crime alleged.

¹ But the practice has been changed by the statute 7 & 8 Geo. IV., ch 28; and now, whenever the prisoner, on his arraignment for any treason, felony, piracy, or misdemeanor, stands mute of malice, or will not answer directly to the charge, a plea of not guilty is entered for him, by order of the Court, and the plea so entered has the same effect as if the prisoner had actually pleaded it. This is also the general practice in the States of this country.

II. A demurrer to the indictment. This is incident to criminal cases, as well as civil, when the fact alleged is allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is no felony, treason, or whatever the crime is alleged to be. Thus, for instance, if a man were indicted for *feloniously* stealing a greyhound; which is an animal in which no valuable property can be had, and therefore it is not felony, but only a civil trespass, to steal it; in this case the party indicted may demur to the indictment; denying it to be felony, though he confesses the act of taking it. Some have held that if, on demurrer, the point of law be adjudged *against* the prisoner, he shall have judgment and execution, as if convicted by verdict. But this is denied by others, who hold, that in such case he shall be directed and received to plead the general issue, not guilty, after a demurrer determined against him. Which appears the more reasonable, because it is clear, that if the prisoner freely discovers the fact in court, and refers it to the opinion of the court, whether it be felony or no, and upon the fact thus shown it appears to be felony; the court will not record the confession, but admit him afterwards to plead not guilty. And this seems to be a case of the same nature, being for the most part a mistake in point of law, and in the conduct of his pleading; and though a man by mispleading may in some cases lose his property, yet the law will not suffer him by such niceties to lose his life. However, upon this doubt, demurrers to indictments are seldom used: since the same advantages may be taken upon a plea of not guilty; or afterwards in arrest of judgment, when the verdict has established the fact.

III. A plea in *abatement* is principally for a *misnomer*, a wrong name, or false addition to the prisoner. As, if *James Allen, gentleman*, is indicted by the name of *John Allen, esquire*, he may plead that he has the name of James, and not of John; and that he is a gentleman, and not an esquire. And, if either fact is found by a jury, then the indictment shall be abated, as writs or declarations may be in civil actions; of which we spoke at large in the preceding book. But, in the end, there is little advantage accruing to the prisoner by means of these dilatory pleas; because, if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner in his plea

avers to be his true name and addition.¹ For it is a rule, upon all pleas in abatement, that he, who takes advantage of a flaw, must at the same time show how it may be amended. Let us therefore next consider a more substantial kind of plea, *viz.* :

IV. Special pleas in *bar*; which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds : a former acquittal, a former conviction, a former attainder, or a pardon.

1. First, the plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime.²

2. Secondly, the plea of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be (being suspended by the benefit of clergy or other causes), is a good plea in bar to an indictment.³ And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime. Hereupon it has been held, that a conviction of manslaughter on an indictment, is a bar in an indictment of murder; for the fact prosecuted is the same in both, though the offences differ in coloring and in degree. It is to be observed, that the pleas of *autrefois acquit* and *autrefois convict*, or a former acquittal, and former conviction, must be upon

¹ Such defects are now amendable by statute 14 & 15 Vict., ch. 100. A similar change in the law has generally been made by statute in the United States, or it has been provided that such defects in an indictment shall be deemed of no importance. Thus, in New York it is provided that "neither a departure from the form or mode prescribed by the Code, in respect to any pleadings or proceedings, nor an error or mistake therein, renders it invalid, unless it have actually prejudiced the defendant, or tend to his prejudice, in respect to a substantial right." (Code Crim. Pro. § 684; see *Id.* § 293.)

² See *Canter v. People*, 1 Abb. Dec. 305; *People v. Ward*, 15 Wend. 231; *People v. Warren*, 1 Parker, 338; *Comm. v. Roby*, 12 Pick. 496.

³ See *Shepherd v. People*, 25 N. Y. 406; *People v. Cramer*, 5 Parker, 171; *People v. McCloskey*, 5 Id. 57; *U. S. v. Wilson*, 7 Pet. 150.

a prosecution for the same identical act and crime. But the case is otherwise, in

3. Thirdly, the plea of *autrefois attainé*, or a former attainder; which is a good plea in bar, whether it be for the same or any other felony.⁴ For wherever a man is attainted of felony, by judgment of death either upon a verdict or confession, by outlawry or heretofore by abjuration; he may plead such attainder in bar to any subsequent indictment for the same or for any other felony. And this because, generally, such proceeding on a second prosecution cannot be to any purpose: for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had: so that it is absurd and superfluous to endeavor to attain him a second time. But to this general rule, however, as to all others, there are some exceptions; wherein, *cessante ratione, cessat et ipsa lex*; as where the former attainder is reversed for error, for then it is the same as if it had never been.

4. Lastly, a *pardon* may be pleaded in bar; as at once destroying the end and purpose of the indictment, by remitting that punishment which the prosecution is calculated to inflict. There is one advantage that attends pleading a pardon in bar, or in arrest of judgment, *before* sentence is past; which gives it by much the preference to pleading it *after* sentence or attainder. This is, that by stopping the judgment it stops the attainder, and prevents the corruption of the blood; which, when once corrupted by attainder, cannot afterwards be restored, otherwise than by act of parliament. But as the title of pardons is applicable to other stages of prosecution; and they have their respective force and efficacy, as well after as before conviction, outlawry, or attainder; I shall therefore reserve the more minute consideration of them, till I have gone through every other title except only that of execution.

Before I conclude this head of special pleas in bar, it will be necessary once more to observe, that though in civil actions when a man has his election what plea in bar to make, he is concluded by that plea, and cannot resort to another if that be determined against him (as if, on action of debt, the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue, *nil debet*, as he might

⁴ Attainder for crime is now abolished. (33 & 34 Vict., ch. 23.) In this country, no such plea as *autrefois attainé* is known.

at first . for he has made his election what plea to abide by, and it was his own folly to choose a rotten defence); though, I say, this strictness is observed in civil actions, *quia interest reipublicæ ut sit finis litium* : yet in criminal prosecutions *in favorem vitæ*, when a prisoner's plea in bar is found against him upon issue tried by a jury, or adjudged against him in point of law by the court ; still he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*, and may plead over to the felony the general issue, not guilty. For the law allows many pleas, by which a prisoner may escape death ; but only one plea, in consequence whereof it can be inflicted ; *viz.* on the general issue, after an impartial examination and decision of the fact, by the unanimous verdict of a jury. It remains therefore that I consider,

V. The general issue, or plea of *not guilty*, upon which plea alone the prisoner can receive his final judgment of death. In case of an indictment of felony or treason, there can be no special justification put in by way of plea. As, on an indictment for murder, a man cannot *plead* that it was in his own defense against a robber on the highway, or a burglar ; but he must plead the general issue, not guilty, and give this special matter in evidence. For (besides that these pleas do in effect amount to the general issue ; since, if true, the prisoner is most clearly not guilty) as the facts in treason are laid to be done *proditorie et contra ligeantiæ suæ debitum*, and, in felony, that the killing was done *felonice* ; these charges, of a traitorous or felonious intent, are the points and very *gist* of the indictment, and must be answered directly, by the general negative, not guilty ; and the jury upon the evidence will take notice of any defensive matter, and give their verdict accordingly, as effectually as if it were, or could be, specially pleaded. So that this is, upon all accounts, the most advantageous plea for the prisoner.

When the prisoner has put himself upon his trial, then they proceed, as soon as conveniently may be, to the trial ; the manner of which will be considered at large in the next chapter.

CHAPTER XXV.

[BL. COMM.—BOOK IV. CH. XXVII.]

Of Trial and Conviction.

THE several methods of trial and conviction of offenders established by the laws of England, were formerly more numerous than at present, through the superstition of our Saxon ancestors : who, like other Northern nations, were extremely addicted to divination : a character which Tacitus observes of the ancient Germans. They therefore invented a considerable number of methods of purgation or trial, to preserve innocence from the danger of false witnesses, and in consequence of a notion that God would always interpose miraculously to vindicate the guiltless.

I. The most ancient species of trial was that by *ordeal*. This was of two sorts, either *fire-ordeal*, or *water-ordeal* ; the former being confined to persons of higher rank, the latter to the common people. Fire-ordeal was performed either by taking up in the hand, unhurt, a piece of red-hot iron, of one, two, or three pounds weight ; or else by walking barefoot, and blindfold, over nine red-hot ploughshares, laid lengthwise at unequal distances : and if the party escaped being hurt, he was adjudged innocent ; but if it happened otherwise, as without collusion it usually did, he was then condemned as guilty.

Water-ordeal was performed, either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt thereby : or by casting the person suspected into a river or pond of cold water ; and, if he floated therein without any action of swimming, it was deemed an evidence of his guilt ; but, if he sunk, he was acquitted.

II. Another species of purgation, somewhat similar to the former, but probably sprung from a presumptuous abuse of revelation in the ages of dark superstition, was the *corsned* or morsel of execration : being a piece of cheese or bread, of about an ounce in weight, which was consecrated with a form of exor-

cism ; desiring of the Almighty that it might cause convulsions and paleness, and find no passage if the man was really guilty ; but might turn to health and nourishment, if he was innocent.

These two antiquated methods of trial were principally in use among our Saxon ancestors. The next, owes its introduction among us to the princes of the Norman line. And that is,

III. The trial by *battel*, duel, or single combat ; which was another species of presumptuous appeal to Providence, under an expectation that Heaven would unquestionably give the victory to the innocent or injured party.

IV. The trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter : "*nullus liber homo capiatur, vel imprisonetur, aut exuletur, aut aliquo modo destruatur, nisi per legale iudicium parium suorum, vel per legem terræ.*"

What was said of juries in general, and the trial thereby, in *civil* cases, will greatly shorten our present remarks, with regard to the trial of *criminal* suits ; indictments and informations : which trial I shall consider in the same method that I did the former ; by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

When, therefore, a prisoner on his arraignment has pleaded *not guilty*, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto* ; that is, freeholders, without just exception, and of the *visne* or neighborhood ; which is interpreted to be of the county where the fact is committed. If the proceedings are before the court of king's bench, there is time allowed, between the assignment and the trial, for a jury to be impanelled by a writ of *venire facias* to the sheriff, as in civil causes ; and the trial in case of a misdemeanor is had at *nisi prius*, unless it be of such consequence as to merit a trial at bar ; which is always invariably had when the prisoner is tried for any capital offence. But before commissioners of *oyer and terminer* and jail-delivery, the sheriff, by virtue of a general precept directed to him beforehand, returns to the court a panel of forty-eight jurors, to try all felons that may be called upon their trial at that session ; and therefore it is there usual to try all felons immediately, or soon after their arraign-

ment. But it is not customary, nor agreeable to the general course of proceedings (unless by consent of parties, or where the defendant is actually in jail), to try persons indicted of smaller misdemeanors at the same court in which they have pleaded *not guilty*, or *traversed* the indictment. But they usually give security to the court, to appear at the next assizes or session, and then and there to try the traverse, giving notice to the prosecutor of the same.

When the trial is called on, the jurors are to be sworn as they appear, to the number of twelve, unless they are challenged by the party.

Challenges may here be made, either on the part of the king, or on that of the prisoner; and either to the whole array, or to the separate polls, for the very same reasons that they may be made in civil causes. For it is here at least as necessary, as there, that the sheriff or returning officer be totally indifferent; and that the particular jurors should be *omni exceptione majores*; not liable to objection either *propter honoris respectum*, *propter defectum*, *propter affectum*, or *propter delictum*. Challenges upon any of the foregoing accounts are styled challenges *for cause*; which may be without stint in both criminal and civil trials. But in criminal cases, or at least in capital ones, there is *in favorem vitæ*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons. 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because upon challenges for cause shown, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

This privilege, of peremptory challenges, though granted to the prisoner, is denied to the king by the statute 33 Edw. 1. stat. 4, which enacts, that the king shall challenge no jurors without assigning a cause certain to be tried and approved by the court. However, it is held that the king need not assign his cause of challenge, till all the panel is gone through, and unless there cannot be a full jury without the person so challenged. And then, and not sooner, the king's counsel must show the cause : otherwise the juror shall be sworn.

The peremptory challenges of the prisoner must, however, have some reasonable boundary ; otherwise he might never be tried. This reasonable boundary is settled by the common law to be the number of thirty-five ; that is, one under the number of three full juries. For the law judges that five-and-thirty are fully sufficient to allow the most timorous man to challenge through mere caprice ; and that he who peremptorily challenges a greater number, or three full juries, has no intention to be tried at all.

And so the law stands at this day with regard to treason of any kind. But by statute 22 Hen. VIII., ch. 14, no person arraigned for felony, can be admitted to make any more than *twenty* peremptory challenges.

If, by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel, a *tales* may be awarded as in civil causes till the number of twelve is sworn, "well and truly to try, and true deliverance make ; between our sovereign lord the king, and the prisoner whom they have in charge ; and a true verdict to give, according to the evidence."¹

When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshalled, examined, and enforced by the counsel for the crown, or prosecution. But it is a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue in any capital crime, unless some point of law shall arise proper to be debated.² A rule, which (however it may be palliated

¹ The practice in regard to the challenging of jurors is regulated, in this country, by the statutes of the several States and by acts of Congress. The usual grounds of challenge are the same as those mentioned in the text.

² This rule has been changed, and counsel is now allowed in all cases. This is also uniformly the rule in the United States.

under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner ; that is, shall see that the proceedings against him are legal and strictly regular) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. And the judges themselves are so sensible of this defect, that they never scruple to allow a prisoner counsel to instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact : for as to matters of law, arising on the trial, they are *entitled* to the assistance of counsel.

The doctrine of evidence upon pleas of the crown, is, in most respects, the same as that upon civil actions. There are, however, a few leading points, wherein by several statutes, and resolutions, a difference is made between civil and criminal evidence.

First, in all cases of high treason, and misprision of treason, by statutes 1 Edw. VI., ch. 12, and 5 and 6 Edw. 6., ch. 11, *two* lawful witnesses are required to convict a prisoner ; unless he shall willingly and without violence *confess* the same. By statute 7 Wm. III., ch. 3, in prosecution for those treasons to which that act extends, the same rule (of requiring *two* witnesses) is again enforced ; with this addition, that the *confession* of the prisoner, which shall countervail the necessity of such proof, must be in *open court*.⁸ In the construction of which act it hath been holden that a confession of the prisoner, taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. But hasty unguarded confessions, made to persons having no such authority, ought not to be admitted as evidence under this statute. And indeed, even in cases of felony at the common law, they are the weakest and most suspicious of all testimony ; ever liable to be obtained by artifice, false hopes, promises of favor, or menaces ; seldom remembered accurately, or reported with due precision ; and incapable in their nature of being disproved by other negative evidence. By the same statute 7 Wm. III., it is declared, that both witnesses must be to the same overt

⁸ It is provided by the United Constitution, that "no person shall be convicted of treason, unless on the testimony of two witnesses, to the same overt act, or on confession in open court." (Art. 3, § 3.) Similar provisions are found in the State constitutions.

act of treason, or one to one overt act, and the other to another overt act, of the same species of treason, and not of distinct heads or kinds ; and no evidence shall be admitted to prove any overt act not expressly laid in the indictment. But in almost every other accusation one positive witness is sufficient. Baron Montesquieu lays it down for a rule that those laws which condemn a man to death *in any case* on the deposition of a single witness, are fatal to liberty ; and he adds this reason, that the witness who affirms, and the accused who denies, make an equal balance ; there is necessity therefore to call in a third man to incline the scale. But this seems to be carrying matters too far : for there are some crimes, in which the very privacy of their nature excludes the possibility of having more than one witness ; must these therefore escape unpunished ? Neither indeed is the bare denial of the person accused equivalent to the positive oath of a disinterested witness. In cases of indictments for perjury, this doctrine is better founded ; and there our law adopts it : for one witness is not allowed to convict a man for perjury ; because then there is only one oath against another. In cases of treason also there is the accused's oath of allegiance, to counterpoise the information of a single witness ; and that may perhaps be one reason why the law requires a double testimony to convict him : though the principal reason, undoubtedly, is to secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages.

Secondly, though from the reversal of Colonel Sidney's attainder by act of parliament in 1689 it may be collected that the mere similitude of handwriting in two papers shown to a jury, without other concurrent testimony, is no evidence that both were written by the same person ; yet undoubtedly the testimony of witnesses, well acquainted with the party's hand, that they believe the paper in question to have been written by him, is evidence to be left to a jury.

Thirdly, all presumptive evidence of felony should be admitted cautiously ; for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer. And Sir Matthew Hale in particular lays down two rules most prudent and necessary to be observed : 1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony

be proved of such goods ; and 2. Never to convict any person of murder and manslaughter, till at least the body be found dead ; on account of two instances he mentions, where persons were executed for the murder of others, who were then alive, but missing.⁴

Lastly, it was an ancient and commonly received practice, that, as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate him-

“ Evidence may be either direct and positive, or presumptive and circumstantial. A presumption of any fact is an inferring of that fact from other facts that are known ; it is an act of reasoning. A fact, however, must not be inferred without premises that will warrant the inference, for the law holds that it is better that ten guilty persons escape, than that one innocent person suffer. If, however, no fact could thus be ascertained by inference, in a court of law, very few offenders would be brought to punishment. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him in the absence of explanation or contradiction ; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction and the accused offers none, human reason cannot do otherwise than adopt the conclusion to which the proof tends. Such is in brief the nature of presumptive evidence, and the reason for admitting it. And there is scarcely a criminal case, from the highest down to the lowest, in which courts of justice do not act upon the principle of giving weight to presumptions ; for as it seldom happens that absolute certainty can be obtained in human affairs, therefore reason and public utility require that judges and all mankind, in forming their opinions of the truth of facts, should be regulated by a preponderance of probabilities. Accordingly, in the highest crime known to the law, viz., treason, our courts act upon presumption. On proof of rebellion or the endeavor to excite rebellion, they presume an attempt to kill the sovereign. In homicide, upon proof of the fact of killing, they presume the malice necessary to constitute murder, and put it on the prisoner, by extracting facts in cross-examination or by direct testimony, to lower his offence to manslaughter or justifiable homicide. In burglary, highway robbery, or simple larceny, if a person is found in possession of the goods recently after the crime has been committed, our law presumes the possessor guilty, unless he can account for the possession. In the case of a libel, which is charged to be written with a particular intent, if the libel is calculated to produce the effect charged to be intended, the intent will be presumed. We must, as reasonable beings, act on presumptive proof, or leave the worst crimes unpunished ; though where presumption is attempted to be raised as to the *corpus delicti*—the commission of the substantive act charged—such presumption ought to be strong and cogent.” (Broom and H. Comm., iv. 445 ; but see *Stokes v. People*, 53 N. Y. 164 ; *State v. Hodge*, 50 N. H. 510.)

self by the testimony of any witnesses. At length by the statute 7 Wm. III. ch. 3, the same measure of justice was established throughout all the realm, in cases of treason within the act: and it was afterwards declared by statute 1 Ann. stat. 2, ch. 9, that in all cases of treason and felony all witnesses *for* the prisoner should be examined upon oath, in like manner as the witnesses *against* him.⁵

⁵Other important rules of evidence applicable in criminal cases are the following:—

“1. No proof is admissible which in its very nature indicates the existence of some better proof; thus *hearsay* evidence is not admissible. This is the objection perhaps most commonly taken to the reception of evidence at a trial for any ordinary offence; statements of third persons made in the absence of the prisoner, being spoken to as evidence against him, when, in fact, such third persons ought to be put into the witness box to testify. Some few exceptions only to this rule which excludes hearsay evidence, need here be mentioned: (a) Upon a trial for felonious homicide, the declarations of the deceased, made when he believed himself to be in a dying state and past hope of recovery, are admissible, the death of the deceased being the subject of the charge, and the circumstances of the death being the subject of the dying declaration. (b) An admission or confession made by the accused is likewise admissible in evidence against him if freely and voluntarily made, — neither induced by a threat of evil, nor by the holding out of any benefit to him. [See Stephen’s Digest of Evidence, (Chase’s ed.) Art’s. 14, 21–26.]

2. No one is competent to give evidence in a court of justice, who, by reason of immaturity of years or mental affection, is unable to comprehend the nature and obligation of an oath, — or who through want of religious belief denies its obligation. Husband and wife cannot (by the common law) testify in a criminal case for or against each other, except on a trial for treason or bigamy, or unless where the very nature of the offence charged, — as if it be a personal wrong done to the wife — necessitates a qualification of the rule. [But modern statutes have sometimes changed this rule.]

3. An irrelevant question ought not to be put, and this rule of rejecting all manner of evidence in criminal prosecutions that is foreign to the point in issue is founded on sound sense and common justice. The rule which requires certainty in the indictment would be nugatory, if evidence irrelevant to the issue raised upon it were admitted. And further, the time of the court must not be uselessly occupied; nor should the attention of the jury be invited to inquiries immaterial — or frivolous — and foreign to the real points for their decision.

4. An artifice of this sort is not permitted — to get from a witness by means of a “leading question” the narrative desired, to suggest the answer which would be acceptable by the very wording and framing of the question. The putting of leading questions, except where allowed with a view to saving time, and in respect of matters, the eliciting of which cannot prejudice the prisoner, or by permission of the court where a witness is manifestly hostile — is much to be deprecated.” (Broom and H. Comm., iv. 447.)

When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict ; but are to consider of it, and deliver it in, with the same forms as upon civil causes : only they cannot, in a criminal case which touches life or member, give a *privy* verdict. But the judges may adjourn while the jury are withdrawn to confer, and return to receive the verdict in open court. And such public or open verdict may be either general, guilty, or not guilty ; or special, setting forth all the circumstances of the case, and praying the judgment of the court, whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they *doubt* the matter of law, and therefore *choose* to leave it to the determination of the court.

If the jury therefore find the prisoner not guilty, he is then for ever quit and discharged of the accusation. And upon such his acquittal, or discharge for want of prosecution, he shall be immediately set at large without payment of any fee to the jailer. But if the jury find him guilty, he is then said to be *convicted* of the crime whereof he stands indicted. Which conviction may accrue two ways ; either by his confessing the offence and pleading guilty ; or by his being found so by the verdict of his country.

CHAPTER XXVI.

[BL. COMM.—BOOK IV. CH. XXVIII.]

Of the Benefit of Clergy.

AFTER trial and conviction the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstance : of which the principal is the *benefit of clergy* ; a title of no small curiosity as well as use ;¹ and concerning

¹ Benefit of clergy was abolished by the statute 6 & 7 Geo. IV., ch. 28. The law upon this subject is, therefore, now entirely obsolete ; but this abbreviated account has been retained, on account of the historical interest of the topic, and the frequent references to it in these Commentaries.

which I shall therefore inquire: 1. Into its original, and the various mutations which this privilege of clergy has sustained. 2. In what cases it is to be allowed.

I. Clergy, the *privilegium clericale*, or in common speech, *the benefit of clergy*, had its original from the pious regard paid by Christian princes to the church in its infant state; and the ill use which the popish ecclesiastics soon made of that pious regard. The exemptions which they granted to the church, were principally of two kinds: 1. Exemption of *places* consecrated to religious duties, from criminal arrests, which was the foundation of sanctuaries; 2. Exemption of the *persons* of clergymen from criminal process before the secular judge in a few particular cases, which was the true original and meaning of the *privilegium clericale*.

But the clergy increasing in wealth, power, honor, number, and interest, began soon to set up for themselves; and that which they obtained by her favor of the civil government, they now claimed as their inherent right: and as a right of the highest nature, indefeasible, and *jure divino*. By their canons therefore and constitutions they endeavored at, and, where they met with easy princes, obtained, a vast extension of these exemptions: as well in regard to the crimes themselves, of which the list became quite universal; as in regard to the persons exempted, among whom were at length comprehended not only every little subordinate officer belonging to the church or clergy, but even many that were totally laymen.

Originally the law was held, that no man should be admitted to the privilege of clergy, but such as had the *habitus et tonsuram clericalem*. But in process of time a much wider and more comprehensive criterion was established: every one that could read (a mark of great learning in those days of ignorance and her sister superstition) being accounted a clerk or *clericus*, and allowed the benefit of clerkship, though neither initiated in holy orders, nor trimmed with the clerical tonsure. But when learning, by means of the invention of printing, and other concurrent causes, began to be more generally disseminated than formerly; and reading was no longer a competent proof of clerkship, or being in holy orders; it was found that as many laymen as divines were admitted to the *privilegium clericale*: and therefore by statute 4 Hen. VII, ch. 13, a distinction was once more drawn

between mere lay scholars, and clerks that were really in orders. And, though it was thought reasonable still to mitigate the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy; being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. Accordingly the statute directs that no person once admitted to the benefit of the clergy, shall be admitted thereto a second time, unless he produces his orders: and in order to distinguish their persons, all laymen who are allowed this privilege shall be burnt with a hot iron in the brawn of the left thumb.

After this burning the laity, and before it the real clergy, were discharged from the sentence of the law in the king's court, and delivered over to the ordinary, to be dealt with according to the ecclesiastical canons. Whereupon the ordinary, not satisfied with the proofs adduced in the profane secular court, set himself formally to work to make a purgation of the offender by a new canonical trial; although he had been previously convicted by his country, or perhaps by his own confession. This trial was held before the bishop in person, or his deputy; and by a jury of twelve clerks: and there, first, the party himself was required to make oath of his own innocence; next, there was to be the oath of twelve compurgators, who swore they believed he spoke truth; then, witnesses were to be examined upon oath, but on behalf of the prisoner only: and lastly, the jury were to bring in their verdict upon oath, which usually acquitted the prisoner; otherwise, if a clerk, he was degraded, or put to penance. A learned judge, in the beginning of the last century, remarks with much indignation the vast complication of perjury and subornation of perjury, in this solemn farce of a mock trial; the witnesses, the compurgators, and the jury, being all of them partakers in the guilt: the delinquent party also, though convicted before on the clearest evidence, and conscious of his own offence, yet was permitted and almost compelled to swear himself not guilty: nor was the good bishop himself, under whose countenance this scene of wickedness was daily transacted, by any means exempt from a share of it. And yet by this purgation the party was restored to his credit, his liberty, his lands, and his capacity for purchasing afresh, and was entirely made a new and an innocent man.

Accordingly the statute of 18 Eliz., ch. 7, enacts, that, for the

avoiding of such perjuries and abuses, after the offender has been allowed his clergy, he shall not be delivered to the ordinary, as formerly ; but, upon such allowance and burning in the hand, he shall forthwith be enlarged and delivered out of prison ; with proviso, that the judge may, if he thinks fit, continue the offender in jail for any time not exceeding a year. The punishment of burning in the *hand*, being found ineffectual, was also changed by statute 10 & 11 Wm. III., ch. 23, into burning in the most visible part of the left *cheek*, nearest the nose : but such an indelible stigma being found by experience to render offenders desperate, this provision was repealed, about seven years afterwards, by statute 5 Ann., ch. 6, and till that period, all women, [by the statutes 3 & 4 Wm. & M., ch. 9, and 4 & 5 Wm. & M. ch. 24], all peers of parliament and peeresses [by statute 1 Edw. VI, ch. 12], and all male commoners who could read, were discharged in all clergyable felonies ; the males absolutely, if clerks in orders ; and other commoners, both male and female, upon branding ; and peers and peeresses without branding, for the first offence : yet all liable (excepting peers and peeresses), if the judge saw occasion, to imprisonment not exceeding a year. And those men who could not read, if under the degree of peerage, were hanged.

[But by subsequent statutes, these rules have been so far changed, that, as the law now stands,] all clerks in orders are, without any branding, and of course without any transportation, fine, or whipping (for those have been substituted in lieu of the other), to be admitted to this privilege, and immediately discharged ; and this as often as they offend. Again, all lords of parliament and peers of the realm and peeresses, shall be discharged in all clergyable felonies without any burning in the hand or imprisonment, or other punishment substituted in its stead, in the same manner as real clerks convict : but this is only for the first offence. Lastly, all the commons of the realm, not in orders, whether male or female, shall for the first offence be discharged of the capital punishment of felonies within the benefit of clergy, upon being burnt in the hand, whipped, or fined, or suffering a discretionary imprisonment in the common jail, the house of correction, one of the penitentiary houses, or in the places of labor for the benefit of some navigation ; or, in case of larceny, upon being transported for seven years, if the court shall think proper.

II. The second point to be considered is, for what *crimes* the

privilegium clericale, or benefit of clergy, is to be allowed. And, it is to be observed, that neither in high treason nor in petit larceny, nor in any mere misdemeanors, it was indulged at the common law; and therefore we may lay it down for a rule that it was allowable only in petit treason and capital felonies. But yet it was not allowable in all felonies whatsoever: for in some it was denied even by the common law; as in arson, that is, the burning of houses. And farther, many other acts of felony are ousted of clergy by particular acts of parliament.

In this state does the benefit of clergy at present stand; very considerably different from its original institution: the wisdom of the English legislature having, in the course of a long and laborious process, extracted by a noble alchemy rich medicines out of poisonous ingredients; and converted, by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics, into a merciful mitigation of the general law, with respect to capital punishment.

CHAPTER XXVII.

[BL. COMM.—BOOK IV. CH. XXIX.]

Of Judgment and its Consequences.

WE are now to consider the next stage of criminal prosecution, after trial and conviction are past, in such crimes and misdemeanors, as are either too high or too low to be included within the benefit of clergy: which is that of *judgment*. For when, upon a capital charge, the jury have brought in their verdict guilty, in the presence of the prisoner; he is either immediately, or at a convenient time soon after, asked by the court, if he has anything to offer why judgment should not be awarded against him. And in case the defendant be found guilty of a misdemeanor (the trial of which may, and does usually, happen in his absence, after he has once appeared), a *capias* is awarded and issued, to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry. But whenever he appears in person, upon either a capital or inferior conviction, he may at

this period, as well as at his arraignment, offer any exceptions to the indictment, in *arrest* or stay of judgment: as for want of sufficient certainty in setting forth either the person, the time, the place, or the offence. And, if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again. And we may take notice, 1. That none of the statutes of *jeofails*, for amendment of errors, extend to indictments or proceedings in criminal cases; and therefore a defective indictment is not aided by a verdict, as defective pleadings in civil cases are. 2. That, in favor of life, great strictness has at all times been observed, in every point of an indictment. Sir Matthew Hale indeed complains, "that this strictness is grown to be a blemish and inconvenience in the law, and the administration thereof: for that more offenders escape by the over-easy ear given to exceptions in indictments, than by their own innocence." And yet no man was more tender of life than this truly excellent judge.

A pardon also, as has been before said, may be pleaded in arrest of judgment, and it has the same advantage when pleaded here, as when pleaded upon arraignment; *viz.*, the saving the attainder, and of course the corruption of the blood: which nothing can restore but parliament, when a pardon is not pleaded till after sentence. And certainly, upon all accounts, when a man hath obtained a pardon, he is in the right to plead it as soon as possible.

Praying the benefit of clergy may also be ranked among the motions in arrest of judgment: of which we spoke largely in the preceding chapter.

If all these resources fail, the court must pronounce that judgment which the law hath annexed to the crime, and which hath been constantly mentioned, together with the crime itself, in some or other of the former chapters. Of these some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead. Some punishments consist in exile or banishment, by abjuration of the realm, or transportation: others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands, or movables, or both, or of the profits of lands for life: others induce a disability, of holding offices or employments, being heirs, executors, and the like. Some are merely pecuniary, by stated or discretionary fines.

When sentence of death, the most terrible and highest judg

ment in the laws of England, is pronounced, the immediate inseparable consequence from the common law is *attainder*. The criminal is then called *attaint*, *attinctus*, stained or blackened. He is no longer of any credit or reputation ; he cannot be a witness in any court : neither is he capable of performing the functions of another man : for, by an anticipation of his punishment, he is already dead in law. This is after *judgment* ; for there is great difference between a man *convicted* and *attainted* : though they are frequently through inaccuracy confounded together. After conviction only a man is liable to none of these disabilities ; for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment ; the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed : he may obtain a pardon, or be allowed the benefit of clergy : both which suppose some latent sparks of merit, which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conspire to prove him completely guilty ; and there is not the remotest possibility left of any thing to be said in his favor. Upon judgment therefore of death, and not before, the attainder of a criminal commences : or upon such circumstances as are equivalent to judgment of death ; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted.

The consequences of attainder are forfeiture and corruption of blood.¹

¹ But by a recent statute it has been enacted that "no confession, conviction, or judgment of or for any treason, or felony, or *felo de se*, shall cause any attainder, or corruption of blood, or any forfeiture or escheat, provided that nothing in this act shall affect the law of forfeiture consequent upon outlawry." (33 & 34 Vict., ch. 23 [1870].)

In the United States, forfeiture, as a general mode of punishment for crimes, has never existed. But the forfeiture of particular property, used in an unlawful transaction, is sometimes prescribed as a penalty in certain classes of offenses. Thus, acts of Congress have been passed, providing that smuggling, or the importation of goods under fraudulent invoices, shall cause a forfeiture, either of the entire invoice or of the property unlawfully imported. Acts of piracy are punished by a forfeiture of the vessel and its appurtenances. But these cases are evidently different from the forfeiture of a person's lands, goods and chattels generally, as under the old English law.

I. Forfeiture is twofold ; of real and personal estates. First, as to real estates : by attainder in high treason, a man forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his rights of entry on lands or tenements which he had at the time of the offence committed, or at any time afterwards, to be for ever vested in the crown, and also the profits of all lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist. This forfeiture relates backwards to the time of the treason committed : so as to avoid all intermediate sales and incumbrances, but not those before the fact

The natural justice of forfeiture or confiscation of property, for treason, is founded on this consideration : that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connections with society ; and hath no longer any right to those advantages, which before belonged to him purely as a member of the community ; among which *social* advantages, the right of transferring or transmitting property to others is one of the chief. Such forfeitures, moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections.

In cases of felony, the offender also forfeits all his chattel interests absolutely, and the profits of all estates of freehold during life ; and after his death, all his lands and tenements in fee simple (but not those in tail) to the crown, for a very short period of time : for the king shall have them for a year and a day, and may commit therein what waste he pleases ; which is called the king's *year, day, and waste*. This year, day, and waste, are now usually compounded for ; but otherwise they regularly belong to the crown ; and, after their expiration, the land would have naturally descended to the heir, did not its feudal quality intercept such descent, and give it by way of escheat to the lord. These forfeitures for felony do also arise only upon attainder ; and therefore a *felo de se* forfeits no land of inheritance or freehold, for he never is attainted as a felon. They likewise relate back to the time of the offence committed, as well as forfeitures for treason ; so as to avoid all intermediate charges and conveyances. This may be hard upon such as have unwarily engaged

with the offender : but the cruelty and reproach must lie on the part, not of the law, but of the criminal ; who has thus knowingly and dishonestly involved others in his own calamities.

These are all the forfeitures of real estates created by the common law, as consequential upon attainders by judgment of death or outlawry.

The forfeiture of goods and chattels accrues in every one of the higher kinds of offence : in high treason or misprision thereof, felonies of all sorts, whether clergyable or not, self-murder or felony *de se*, petit larceny, standing mute, and the offences of striking in Westminster-hall, or drawing a weapon upon a judge there sitting in the king's courts of justice.

There is a remarkable difference or two between the forfeiture of lands, and of goods and chattels. 1. Lands are forfeited upon *attainder*, and not before : goods and chattels are forfeited by *conviction*. Because in many of the cases where goods are forfeited, there never is any attainder ; which happens only where judgment of death or outlawry is given : therefore in those cases the forfeiture must be upon conviction or not at all ; and, being necessarily upon conviction in those, it is so ordered in all other cases, for the law loves uniformity. 2. The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and incumbrances ; but the forfeiture of goods and chattels has no relation backwards ; so that those only which a man has at the time of conviction shall be forfeited. Therefore a traitor or felon may *bona fide* sell any of his chattels, real or personal, for the sustenance of himself and family between the fact and conviction ; for personal property is of so fluctuating a nature, that it passes through many hands in a short time ; and no buyer could be safe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treason or felony. Yet if they be collusively and not *bona fide* parted with, merely to defraud the crown, the law (and particularly the statute 13 Eliz., ch. 5) will reach them ; for they are all the while truly and substantially the goods of the offender : and as he, if acquitted, might recover them himself, as not parted with for a good consideration ; so in case he happens to be convicted, the law will recover them for the king.

II. Another immediate consequence of attainder is the *corruption of blood*, both upwards and downwards ; so that an at

tainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir ; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture ; and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor.

CHAPTER XXVIII.

[BL. COMM.—BOOK IV. CH. XXX.]

Of Reversal of Judgment.

WE are next to consider how judgments, with their several connected consequences, of attainder, forfeiture, and corruption of blood, may be set aside. There are two ways of doing this : either by falsifying or reversing the judgment, or else by a reprieve or pardon.

A judgment may be falsified, reversed, or avoided, in the first place, *without a writ of error*, for matters foreign to or *dehors* the record, that is, not apparent upon the face of it ; so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself : and therefore if the whole record be not certified, or not truly certified, by the inferior court, the party injured thereby (in both civil and criminal cases) may allege a *diminution* of the record, and cause it to be rectified. Thus, if any judgment whatever be given by persons, who had no good commission to proceed against the person condemned, it is void ; and may be falsified by showing the special matter without writ of error.

Secondly, a judgment may be reversed *by writ of error* :¹ which lies from all inferior criminal jurisdictions to the court of king's bench, and from the king's bench to the house of peers ;

¹ The practice upon writs of error is, to a great extent, regulated by statute in the different States.

and may be brought for notorious mistakes in the judgment or other parts of the record : as where a man is found guilty of perjury and receives the judgment of felony, or for other less palpal errors ; such as any irregularity, omission, or want of form in the process of outlawry, or proclamations : the want of a proper *addition* to the defendant's name, according to the statute of additions ; for not properly naming the sheriff or other officer of the court, or not duly describing where his county court was held ; for laying an offence committed in the time of the late king, to be done against the peace of the present ; and for other similar causes, which (though allowed out of tenderness to life and liberty) are not much to the credit or advancement of the national justice. These writs of error, to reverse judgments in case of misdemeanors, are not to be allowed of course, but on sufficient probable cause shown to the attorney-general ; and then they are understood to be grantable of common right, and *ex debito justitiæ*. But writs of error to reverse attainders in capital cases are only allowed *ex gratia* ; and not without express warrant under the king's sign manual, or at least by the consent of the attorney-general. These therefore can rarely be brought by the party himself, especially where he is attainted for an offence against the State ; but they may be brought by his heir, or executor, after his death, in more favorable times ; which may be some consolation to his family. But the easier, and more effectual way, is,

Lastly, to reverse the attainder by act of parliament. This may be and hath been frequently done, upon motives of compassion, or perhaps from the zeal of the times, after a sudden revolution in the government, without examining too closely into the truth or validity of the errors assigned. And sometimes, though the crime be universally acknowledged and confessed, yet the merits of the criminal's family shall after his death obtain a restitution in blood, honors, and estate, or some, or one of them, by act of parliament ; which (so far as it extends) has all the effect of reversing the attainder, without casting any reflections upon the justice of the preceding sentence.

When judgment pronounced upon conviction is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused ; restored in his credit, his capacity, his blood, and his estates : with regard to

which last, though they may be granted away by the crown, yet the owner may enter upon the grantee, with as little ceremony as he might enter upon a disseizor. But he still remains liable to another prosecution for the same offense ; for the first being erroneous, he never was in jeopardy thereby.

CHAPTER XXIX.

[BL. COMM.—BOOK IV. CH. XXXI.]

Of Reprieve and Pardon.

THE only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon ; whereof the former is temporary only, the latter permanent.

I. A reprieve, from *reprendre*, to take back, is the withdrawing of a sentence for an interval of time : whereby the execution is suspended. This may be, first, *ex arbitrio judicis* ; either before or after judgment ; as, where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offense be within clergy ; or sometimes if it be a small felony, or any favorable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol-delivery, although their session be finished, and their commission expired : but this rather by common usage, than of strict right.

Reprieves may also be *ex necessitate legis* : as, where a woman is capitally convicted, and pleads her pregnancy ; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to inquire the fact : and if they bring in their verdict, *quick with child* (for barely, *with child*, unless it be alive in the womb, is not sufficient), execution shall be stayed generally till the next session ; and so from session to session, till either she is delivered, or proves by the course of nature not to have

been with child at all. But if she once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, she shall not be entitled to the benefit of a farther respite for that cause. For she may now be executed before the child is quick in the womb ; and shall not, by her own incontinence, evade the sentence of justice.

Another cause of regular reprieve is, if the offender becomes *non compos* between the judgment and the award of execution : for regularly, as was formerly observed, though a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted ; if after indictment, he shall not be convicted ; if after conviction, he shall not receive judgment ; if after judgment, he shall not be ordered for execution : for, "*furiosus solo furore punitur*," and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is therefore an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to allege, why execution should not be awarded against him : and if he appears to be insane, the judge in his discretion may and ought to reprieve him.

II. If neither pregnancy, insanity, nor other plea, will avail to avoid the judgment, and stay the execution consequent thereupon, the last and surest resort is in the king's most gracious *pardon* ; the granting of which is the most amiable prerogative of the crown. Law (says an able writer) cannot be framed on principles of compassion to guilt ; yet justice, by the constitution of England, is bound to be administered in mercy ; this is promised by the king in his coronation oath, and it is that act of his government, which is the most personal, and most entirely his own. The king himself condemns no man ; that rugged task he leaves to his courts of justice : the great operation of his sceptre is mercy.

Under this head of pardons, let us briefly consider, 1. The *object* of pardon : 2. The *manner* of pardoning : 3. The *effect* of such pardon, when allowed.

I. And first, the king may pardon all offences merely against the crown, or the public ; excepting where private justice is principally concerned in the prosecution of offenders : "*non potest rex gratiam facere cum injuria et damno aliorum*." Neither can

he pardon a common nuisance, while it remains unredressed, or so as to prevent an abatement of it, though afterwards he may remit the fine : because though the prosecution is vested in the king to avoid multiplicity of suits, yet (during its continuance) this offense savors more of the nature of a private injury to each individual in the neighborhood, than of a *public* wrong. Neither, lastly, can the king pardon an offence against a popular or penal statute, after information brought ; for thereby the informer hath acquired a private property in his part of the penalty.

There is also a restriction of a peculiar nature, that affects the prerogative of pardoning, in case of parliamentary impeachments ; *viz.*, that the king's pardon cannot be *pleaded* to any such impeachment, so as to impede the inquiry, and stop the prosecution of great and notorious offenders.¹ It was enacted by the act of settlement, 12 & 13 Wm. III., ch. 2, "that no pardon under the great seal of England shall be *pleadable* to an impeachment by the commons in parliament." But, after the impeachment has been solemnly heard and determined, it is not understood that the king's royal grace is farther restrained or abridged : for after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's most gracious pardon.

2. As to the *manner* of pardoning. It must be under the *great* seal. A warrant under the privy seal, or sign manual, though it may be a sufficient authority to admit the party to bail, in order to plead the king's pardon, when obtained in proper form, yet is not of itself a complete irrevocable pardon.

A pardon may be *conditional* ; that is, the king may extend his mercy upon what terms he pleases ; and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend ; and this by the common law. Which prerogative is daily exerted in the pardon of felons, on condition of being confined to hard

¹ The United States Constitution gives the President "power to grant reprieves and pardons, for offenses against the United States, except in cases of impeachment." (Art. 2, § 2.) In the several States of the Union, similar power is usually reposed in the Governor, though sometimes in a special pardoning council, to whom applications for pardon are referred.

labor for a stated time, or of transportation to some foreign country for life, or for a term of years.

3. Lastly, the *effect* of such pardon by the king, is to make the offender a new man ; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon ; and not so much to restore his former, as to give him a new credit and capacity. But nothing can restore or purify the blood when once corrupted, if the pardon be not allowed till after **attainder**, but the high and transcendent power of parliament.

CHAPTER XXX.

[BL. COMM.—BOOK IV. CH. XXXII.]

Of Execution.

THERE now remains nothing to speak of, but *execution* ; the completion of human punishment. And this, in all cases, as well capital as otherwise, must be performed by the legal officer, the sheriff or his deputy ; whose warrant for so doing was anciently by precept under the hand and seal of the judge. Afterwards it was established, that, in case of life, the judge may command execution to be done without any writ. And now the usage is, for the judge to sign the calendar, or list of all the prisoners' names, with their separate judgments in the margin, which is left with the sheriff. As, for a capital felony, it is written opposite to the prisoner's name, "let him be hanged by the neck ;" formerly in the days of Latin an abbreviation, "*sus. per col.*" for "*suspendatur per collum.*" And this is the only warrant that the sheriff has for so material an act as taking away the life of another.

The sheriff, upon receipt of his warrant, is to do execution within a convenient time ; which in the country is also left at large. In London indeed a more solemn and becoming exactness is used, both as to the warrant of execution, and the time of executing thereof ; for the recorder, after reporting to the king in person the case of the several prisoners, and receiving his royal pleasure, that the law must take its course, issues

his warrant to the sheriffs ; directing them to do execution on the day and at the place assigned. And, in the court of king's bench, if the prisoner be tried at the bar, or brought there by *habeas corpus*, a rule is made for his execution ; either specifying the time and place, or leaving it to the discretion of the sheriff. And, throughout the kingdom, by statute 25 Geo. II., ch. 37, it is enacted, that, in case of murder, the judge shall in his sentence direct execution to be performed on the next day but one after sentence passed. But, otherwise, the time and place of execution are by law no part of the judgment. It has been well observed that it is of great importance, that the punishment should follow the crime as early as possible ; that the prospect of gratification or advantage, which tempts a man to commit the crime, should instantly awake the attendant idea of punishment. Delay of execution serves only to separate these ideas ; and then the execution itself affects the mind of the spectators rather as a terrible sight, than as the necessary consequence of transgression.

The sheriff cannot alter the manner of the execution by substituting one death for another, without being guilty of felony himself, as has been formerly said. It is held also by Sir Edward Coke and Sir Matthew Hale, that even the king cannot change the punishment of the law, by altering the hanging or burning into beheading ; though, when beheading is part of the sentence, the king may remit the rest. And, notwithstanding some examples to the contrary, Sir Edward Coke stoutly maintains, that "*judicandum est legibus, non exemplis.*" But others have thought, and more justly, that this prerogative, being founded in mercy, and immemorially exercised by the crown, is part of the common law.

To conclude : it is clear, that if, upon judgment to be hanged by the neck till he is dead, the criminal be not thoroughly killed, but revives, the sheriff must hang him again. For the former hanging was no execution of the sentence ; and, if a false tenderness were to be indulged in such cases, a multitude of collusions might ensue.¹

¹ The execution of capital sentences is fully regulated in this country by the statutes of the respective States. The death penalty is usually inflicted only in cases of murder in the first degree, and in some States has been abolished altogether. The ordinary punishment in cases of felony is imprisonment in a state prison ; in cases of misdemeanor, fine or imprisonment in a county jail, or both.

And having thus arrived at the *last* stage of criminal proceedings, or execution, the end and completion of human *punishment*, which was the sixth and last head to be considered under the division of *public wrongs*, the fourth and last object of the laws of England ; these Commentaries will here be brought to an end.

APPENDIX.

I.

Glossary of Technical Terms, etc.

The following words and phrases used by Blackstone, and having a technical or peculiar meaning, are here defined for the convenience of the student. To ascertain the meaning of other words, which may not be understood, the Index should be consulted.

Brief accounts are also given of some famous English law writers of early times, who are often referred to by Blackstone.

[A number following a word denotes the page of the text where such word is used.]

Abear'ance. Behavior; conduct.

Abjura'tion. A renouncing by oath: *abjuration of the realm*, an oath taken to leave the realm forever; *oath of abjuration*, in England, an oath renouncing all right of descendants of the Pretender to the crown.

Ad quod dam'num (425). [Lat. "to what damage."] In English law, a writ directing the sheriff to inquire by the oath of jurors *to what damage* a grant (as of a fair, market, liberty, or other franchise), intended to be made by the king, would be, both as to the king and as to others.

Addi'tion. A title or appellation annexed to a person's name to show his rank, occupation, or place of residence, as, *e.g.*, knight, yeoman, esquire, scrivener, etc.; formerly required by the statute of additions (1 Henry V. c. 5) to be stated in original writs and in indictments in certain cases; but this practice is now abolished.

Advow'son. [Lat. *ad* and *voco*, to call.] The right of presenting or nominating a person to a vacant benefice in the church.

Aid. (1) A grant of a tax or subsidy to the king for an extraordinary purpose (see p. 80). (2) A feudal aid, which is explained on pp. 257 and 276.

Amor'tise (426). To alienate or convey lands in mortmain, *i.e.* to a corporation, ecclesiastical or temporal.

Appropriator (427). In English law, formerly, the possessor of an appropriated benefice, *i.e.* a benefice which has been perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living.

Assize. [Lat. *assidēre*, to sit at, sit down to, from *ad*, to, and *sedeo*, to

sit.] (1) A decree, edict, or statute; an ordinance or regulation as to amount, quantity, etc.; as the *assize of arms* (259), the *assize of bread* (923), etc. So *rents of assize* (240) are fixed, established rents. (2) For other meanings of the word, see p. 723.

Attach'ment. (1) A seizure of or levy upon *property* under legal process. (2) The arrest or apprehension of a *person* under authority of law. The word is used commonly in this latter sense in proceedings to punish a person for contempt of court.

Attaint'. (1) An ancient English writ which lay to inquire whether a jury of twelve men gave a false verdict; if it was so found, the former judgment was reversed (see p. 811). The jury to try the former verdict numbered twenty-four. Abolished in 1826. (2) Attainted, *i.e.* stained or blackened; under an attainder for crime (see p. 1036).

Avow'ant. The person who makes avowry in an action of replevin. Avowry is explained on p. 703.

Bar'retor (98). A fomenter of quarrels and lawsuits; one who excites dissension and litigation among neighbors.

Bill of mortal'ity (797). A statement of the number of deaths within a certain locality during a given time. A person living in a particular district for which such a bill is prepared is said to reside within the bills of mortality.

Black Act (711). An English statute passed in 1722 (9 Geo. I. c. 22), on account of certain outrages committed near Waltham in Hampshire by persons with faces *blackened* or otherwise disguised; it made felonies of certain offences against the game laws by persons in disguise, of many acts of malicious mischief, of the sending of anonymous letters demanding money, etc. Repealed in 1827.

Bors'holder (see **Head-borough**, *post*).

Brac'ton, Henry de. A celebrated English jurist and legal writer who lived in the reign of Henry III. and was for many years a justice of the King's Court. He is thought by some to have been also chief justice for a few years. He wrote an extended treatise in Latin upon the laws and customs of England (*De Legibus et Consuetudinibus Angliæ*), which is the chief source of our knowledge concerning the English laws of this early time, and is of great value and interest. An edition has recently been issued by Sir Travers Twiss, containing both the Latin text and a translation. (See Kent's Comm. I. 500.)

Brit'ton. The name of a treatise upon English law, written in French in the reign of Edward I. There has been much discussion as to its authorship. Lord Coke attributed it to John le Breton, bishop of Hereford, while other writers have thought it to be merely an abridgment of Bracton's work, since Bracton's name is found to have been spelt variously as Bratton and Bretton; but there are difficulties in the way of accepting either theory. An edition of this work, with translation by F. M. Nicholls, was published in England in 1865. (See Kent's Comm. I. 501.)

Brooke, Robert. Chief justice of the Court of Common Pleas in England, from 1554-1558. He wrote a number of important legal works, the chief of

which was *La Graunde Abridgement*, published in 1573, which was an abstract of the Year Books down to his own time. It was based upon Fitzherbert's Abridgment, and was regarded as superior to that work. A selection of the more recent cases from this abridgment was afterwards published separately, under the title *Brooke's New Cases*.

Bur'gess (189). An inhabitant or citizen of a borough.

Certiora'ri. [Late Lat. "to be certified."] A writ issued by a superior court requiring the judges or officers of an inferior court, or other persons having judicial powers, to *certify* or return the proceedings or record of a case before them to such higher court, that it may take due action thereon; as where it is desired to have the determination of the lower court reviewed in the higher, or to have a return made more accurate and complete for use upon a writ of error or appeal, etc.

Chaun'try (426, 842). [Fr. *chanter*, to sing.] A church or chapel endowed for the saying of masses for the souls of the donors.

Cinque ports (692). [Fr. *cinque*, five, and *ports*.] The five English ports, Hastings, Romney, Hythe, Dover, and Sandwich. They were deemed important defences against French invasion, and received at an early day special privileges, and were obliged to furnish a certain number of ships for use in war.

Civil'ian (160). One versed in the civil or Roman law. A professor or doctor of the civil law.

Clerk. Often used in English law to denote a clergyman or ecclesiastic, a person in holy orders.

Coke, Ed'ward. Chief justice of the Court of Common Pleas from 1606-1613, chief justice of the King's Bench from 1613-1616. Died in 1633, at the age of 81. His is one of the most distinguished names among English judges and law-writers. An account of his works is given by Blackstone on pp. 38 and 39.

Commend'am (646). [Late Lat. *commenda*, from *commendo*, to commend, intrust.] In English ecclesiastical law, a benefice or living bestowed upon a clergyman to hold until a regular pastor is appointed. This may be temporary or permanent.

Com'mon Rule (732). In an action of ejectment at common law, an order of court that the actual tenant in possession of the land, or the person claiming title in opposition to the plaintiff, might be made defendant in place of the fictitious defendant previously named in the action, upon condition of confessing lease, entry, and ouster, so that the trial might depend wholly upon the question of title.

Compurga'tors (836, 1032). [Lat. *con* and *purgo*, to purify.] In old English law, neighbors of a person on trial for crime or in a civil action, who swore that they believed his statements under oath which he made to exculpate himself; such evidence by them was received in his justification.

Constitu'tions of Clar'endon (424). Certain laws established in England during the reign of Henry II. by a council or parliament held at Clarendon,

by which the power of the pope and his clergy was narrowed, and the exemption which they claimed from secular jurisdiction was much limited.

Cor'ody. [Late Lat. *corrodium*, furniture, provision.] In old English law, a right to receive a certain allotment of food and provisions for one's maintenance. When due from ecclesiastical persons, a pension or sum of money was often substituted. Now obsolete.

Coun'try (781, 786, 1023). A jury, as representing the citizens of a country. Thus when a defendant in common law pleading said that he "put himself upon the country," the meaning was that he submitted the case to trial by jury.

Coun'ty Pal'atine (692). [Lat. *palatium*, palace.] In England, a county possessing particular privileges; so called originally because their owners possessed similar powers in certain respects to those exercised by the king in his palace. They have either ceased to exist or have lost their special privileges in large measure.

Court-leet. An ancient English court of criminal jurisdiction, held once a year within a particular hundred, lordship, or manor, for the trial of minor offences.

Coz'en (923). [Fr. *cousiner*, to call cousin; to claim kindred for advantage.] To cheat; to deceive; to defraud.

Cur'tilage (960). [Lat. *cors*, a court.] Land contiguous to a dwelling-house and occupied therewith, and included within the same fence or common enclosure or court-yard.

Demise'. (1) Death; usually applied only to the death of a king or queen. (2) The conveyance of an estate either in fee, for life, or for years; most frequently applied to estates less than a fee.

Deter'mine. To end or terminate; as, *e.g.*, a right or an office is determined. Often so used by Blackstone.

Dig'nity. The rank or title of a nobleman; deemed in English law to be an incorporeal hereditament.

Disaffor'est (237). To free from the operation of forest laws land reduced thereby to forests, and thus restore them to their former state.

Disher'ison (430). The disinheriting of a person; the depriving him of his inheritance.

Doc'tors' Com'mons (657). A name applied to the courts and offices in London wherein the ecclesiastical and admiralty courts were held, and the advocates or "doctors" in those courts practised. By a statute of 1857, power was given to dissolve the college of Doctors' Commons and sell the property.

Dot'a'tion. The giving of an endowment; the bestowal of property upon a person or corporation.

Droit d'au'baine (120). A right claimed by the state, as in France, to appropriate all the personal property therein of a deceased alien, to the exclusion of his alien heirs. This was abolished in 1790, was restored by Napoleon I., and finally abolished in 1819.

Egypt'tians (848). Gypsies, against whom laws of excessive rigor were formerly enacted in England. Such statutes are now repealed.

Esquire' (99). [Old Fr. *escuyer*, a shield-bearer.] In England, a title of dignity next below that of knight, and above that of gentleman.

Estray. A tame animal, as a horse, ox, or sheep, found at large, whose owner is unknown.

Extend' (473). To levy upon by writ of execution.

Farm'er (299). A tenant or lessee of a farm; one who hires and pays rent for agricultural land.

Finch, Henry. An English legal writer of distinction, who lived in the reigns of Elizabeth and James I. He published in 1613 a treatise in law-French, called a *Description of the Common Laws of England*. "Finch's Law," as it was called, enjoyed a high reputation in its day. Several translations have been published.

Fitzher'bert, An'thony. A judge of the Court of Common Pleas from 1522-1538. His notes display great learning in the law of his time. He wrote the *Grand Abridgment*, containing an abstract of the Year Books down to his time, the *New Natura Brevium* (Nature of Writs), and various other works. (See Kent's Comm. I. 508.)

Fle'ta. The name of a treatise upon English law, written in Latin in the reign of Edward I. Its real authorship is unknown, but its name is attributed to its having been written by some learned lawyer while he was confined in the *Fleet* prison. It draws largely from Bracton's work, but shows also the alterations in the law since Bracton's time.

Fore'judge (73, 78). To deprive by the judgment of a court; to condemn to lose a thing.

For'tescue, John. Chief justice of the Court of King's Bench from 1442-1460. His treatise in Latin upon the laws of England, entitled *De Laudibus Legum Angliæ*, attained great celebrity, and has been spoken of as being especially interesting from "its popular form and historical details." A translation of it by Francis Gregor has been published. (See Kent's Comm. I. 502.)

Free Bench. In English law, the dower which a widow had, by the custom of certain manors, in her husband's copyhold lands; so called, says Lord Coke, "for that it cometh *freely*, without any act of the husband's or assignment of the heir."

Glan'vil, Ranulph de. Chief justiciary of England from 1180-1189, during the reign of Henry II. He was one of the earliest writers upon English law, and his treatise, written in Latin, upon the laws and customs of England (*Tractatus de Legibus et Consuetudinibus Regni Angliæ*) is a valuable source of information concerning ancient English law. It treats of the ancient actions and the forms of writs then in use. A translation of it by J. Beames has been published in England. (See Kent's Comm. I. 499.)

Glebe [Lat. *gleba*, a clod of earth]. A tract of land belonging to a parish church or ecclesiastical benefice, and used as a source of its revenues.

Gloss (494). [Gr. *glossa*, a tongue.] A comment or explanation; an explanatory discussion of a document or treatise.

Grand Coustu'mier (509). A name given to each of two collections of ancient French laws. One (the *Coustumier de Normandie*) embodies the ancient laws and customs of Normandy; it was compiled about the year 1229. It has many points of similarity with the ancient laws of England. The other (the *Coustumier de France*) is of later origin, having been finished in 1609, and comprises the laws, customs, etc., which had been in use in France from time immemorial.

Hale Mat'thew. Judge of the Court of Common Pleas from 1654-1658, chief baron of the Exchequer from 1660-1671, chief justice of the King's Bench from 1671-1676. His chief legal works were, (1) *A History of the Pleas of the Crown*, which is a treatise of the highest value upon the early criminal law of England; (2) *A History of the Common Law*; (3) *An Analysis of the Law*. The last was the basis of Blackstone's Commentaries.

Head'borough. In England formerly, the head man or chief of a tithing, which was so called because *ten* freeholders with their families composed one; called also *borsholder*, i.e. tithing's elder.

Heng'ham, Ralph de. Chief justice of the King's Bench from 1274-1290, and afterwards chief justice of the Common Pleas from 1301-1309. He compiled the *Registrum Brevium* (see **Register**), and left other works called *Hengham Magna* and *Hengham Parva*, which were afterwards published.

Her'iot. [Ang. Sax. *heregeatu*, military apparel.] A customary tribute of goods and chattels payable to the lord of the fee on the death of the tenant of the land. This burden attached to copyhold land chiefly, and the heriot was sometimes the best live beast of the tenant, sometimes the best inanimate chattel, as a jewel or piece of plate, etc., according to the lord's option.

High Commis'sion Court (836). An ecclesiastical court established in England by the statute 1 Eliz. c. 1, and abolished by the act 16 Car. I. c. 11. It had extensive jurisdiction, and was intended to vindicate the dignity and peace of the Church by reforming, ordering, and correcting the ecclesiastical state and persons, and all manner of errors, heresies, schisms, abuses, and offences.

Hom'age. Used on page 280 to denote the jury of a court baron; so-called because composed of persons owing homage to the lord.

Hon'or. The seigniori of a lord paramount.

Hos'pitallers (425). An order of knights who founded and maintained a hospital or hostelry at Jerusalem for pilgrims; called also *Knights of St. John*, or *Knights of Malta*.

Hove'den Roger. An English historian who lived about 1170-1200. He wrote in Latin a history of England from 731-1202.

Hun'dred. A division of a county in England; supposed to have originally derived its name from having contained ten tithings, or a hundred families.

Inns of Court. The name given in England to four voluntary societies which have the exclusive right of calling persons to the bar. Their names are the Inner Temple, the Middle Temple, Lincoln's Inn, and Gray's Inn. Each is governed by a body of senior counsel called "benchers." The houses or "chambers" owned by them are chiefly occupied by barristers and are a source of large income.

Innuen'do (684). [Lat. *innuo*, to nod, to signify.] A statement in the plaintiff's pleading, in actions for libel or slander, of the *meanings* attributed by the plaintiff to the defendant's words for which the action is brought. So an indictment for libel may contain *innuendoes*. When the defendant's words are ambiguous, *innuendoes* are necessary to show their actionable character. Each *innuendo* is put in parenthesis after the word or phrase to be explained, and begins with the word "meaning," after which follows the statement of the alleged meaning. Formerly when pleadings were in Latin, the word *innuendo* was the prefatory word, — hence the name.

Knights Tem'plar (425). An order of knights established at Jerusalem in 1118 for the defence of the holy sepulchre and of pilgrims. They took originally vows of poverty, obedience, and chastity, and the order gained great fame for valor and piety. But in course of time it was corrupted by wealth and luxury, and was finally suppressed by the efforts of the pope in 1312.

Lach'es. [Lat. *laxus*, slow.] Remissness, negligence, undue delay or default.

Lev'y. (1) To raise or collect; as to levy a tax or rate. (2) To seize or take possession of under process of execution. (3) To *levy a fine* is to begin and carry on a suit for the purpose of conveying a title to lands to the defendant under the doctrine of fines, by the acknowledgment on record of the plaintiff.

Li'bel. In the law of procedure, a statement of the plaintiff in a suit of his cause of action and the relief which he demands. This term is used in the practice of ecclesiastical and admiralty courts, and corresponds to the *declaration* or *complaint* of common law practice.

Lit'tleton, Thomas. Judge of the Court of Common Pleas from 1466–1481. His little *Treatise on Tenures* became a legal classic, and Lord Coke's commentary thereon forms the first book of Coke's Institutes. (See Kent's Comm. I. 503.)

Mark (489). Denotes a certain amount or value in money. In England it was equal to 13s. 4d. = \$3.24½. In other countries its value differed.

Mar'riage-art'icles (164). Articles or terms of agreement between parties contemplating marriage, stating the conditions and stipulations as to property rights and other matters, by which they are to be governed when the marriage is effected.

Metropol'itan. The bishop who presides over the bishops of a province; an archbishop.

Mir'ror. The *Mirror*, often referred to by Blackstone, is a legal treatise

called the *Mirror of Justices*, which was written during the reign of Edward II., and first published in 1642. The supposed writer was Andrew Horne.

Mise (776). [Lat. *mitto*, Fr. *mettre*, to put, to place.] In English law formerly, the issue in real actions, particularly in writs of right; so-called because the case was *put* or rested on this point.

Mit'timus. [Lat. "we send," from *mitto*, to send.] (1) A warrant for the commitment to prison of a person charged with a crime. (2) A writ to remove records from one court to another.

Mo'dus. A composition for tithes; money, services, chattels, etc., given in lieu of tithes; the full name is *modus decimandi*.

Mor'tuary. In English law a customary gift claimed by and due to a minister of a parish on the death of a parishioner.

Mys'tery (130, 1007). A trade, calling, or occupation.

No'ble (489). The half part of a mark = 6s. 8d. (see **Mark**, *supra*).

Ob'it (426). [Lat. *obeo*, to die.] A church service or celebration for the soul of a deceased person upon the anniversary of his death.

Of'fice. A right to exercise a public or private employment, and to take the fees and emoluments thereto belonging; whether public, as that of a magistrate, or private, as that of a receiver, bailiff, etc. Offices are ranked among incorporeal hereditaments in English law, but not in this country.

Oleron', Laws of (667). A celebrated code of maritime law, compiled and promulgated in the 12th century, in the island of Oleron, which lies off the west coast of France. It was based upon earlier codes containing the maritime usages and regulations of the Mediterranean States. It has had a notable influence upon the admiralty jurisprudence of modern times. (See Kent's Comm. III. 12.)

Or'dinary. In ecclesiastical law, a dignitary of the Church who has ordinary and immediate jurisdiction over ecclesiastical matters, and does not act as a deputy; hence, in English law, the name commonly denotes the bishop, who is ordinary of his own diocese.

Owl'ing (535). In English law, the offence of transporting wool or sheep out of the kingdom, to the detriment of its staple manufacture; so-called from being carried on at night. Now abolished.

Postlimin'ium. A term of the Roman law, denoting the right of a subject who had lost his rights of citizenship, family, and property, in consequence of capture by an enemy, to be restored to them on regaining his liberty and returning.

Præ'cipe. [Lat. "command."] In English practice, formerly, the name of an original writ *commanding* the defendant to do an act specified or show cause why he has not done it. Actions to recover real property were begun by this form of writ; hence a *tenant to the præcipe* was one having seisin of the freehold, so as to receive service of a *præcipe* and defend actions to recover the land.

Præmuni're. [A corrupt form of the Lat. *præmonere*, to forewarn.] In English law, the offence of introducing a foreign power into the realm, and

thus creating *imperium in imperio*, by paying that obedience to papal process which properly belonged to the king alone. Many statutes declared the acts which were deemed to constitute this offence, and imposed very severe penalties. The name is derived from the words of the writ used in prosecuting the offence: "*præmunire facias A. B.*," cause A. B. to be forewarned that he appear before us to answer the contempt wherewith he stands charged, etc.

Preb'end. In England, the stipend granted from the estate of a cathedral or collegiate church to the officiating clergyman, who is hence called a *prebendary*.

Procura'tion-money. A commission paid to a broker or other person for obtaining a loan of money.

Prothon'otary. [Gr. *πρωτος*, first, and Lat. *notarius*, notary.] Formerly in England, a chief clerk in the Courts of King's Bench and Common Pleas. Afterwards this office was abolished, and that of *master* took its place. In some American States the name prothonotary is still in use to designate a clerk of court.

Puis'ne. [Fr. *puis*, since, and *né*, born.] Junior; inferior in rank.

Purpres'ture. [Old Fr. *pourprendre*, to take away entirely.] An enclosure of, or encroachment upon, any part of the public domain, as upon a highway, harbor, public river, etc.

Pur'view (320). [Fr. *pourvu*, provided.] The body of a statute or that part which begins with the words "*Be it enacted.*" It excludes the preamble, and the final repealing clause, if any.

Que Estate. [Fr. "whose estate."] Formerly in pleading, when a party claiming to have acquired an estate or right by prescription, averred that he and those whose estate he has (*que estate il ad*) have been used to enjoy the right claimed for the due period of time, etc., he was said to prescribe in a "*que estate.*"

Reclaim' (924). [Lat. *reclamo*, to cry out against.] To *reclaim against* is to cry out against, to oppose.

Recogni'tion (649, 724). (1) The old form of real action, called an assize (see page 723). (2) The trial or hearing of an assize. Hence the jury summoned upon an assize were called *recognitors*.

Reg'ister (438, 644). The *Registrum Brevium*, or Register of Writs, which is a collection of the different forms of original and judicial writs, which might be used in former times in England in beginning actions of various kinds. (See pages 643, 756.) It is of great historical value.

Remise'. [Lat. *remitto*, to send back.] To give or grant back; to give up or relinquish.

Remit'ter (702). [Lat. *remitto*, to send back.] A sending back or restoration of a person to a title he had before.

Res'cous. A rescue. (See page 903.)

Rho'dian Laws (667). A code of maritime law, whose compilation is attributed to the inhabitants of the island of Rhodes, about nine hundred years

before the Christian era. It is the oldest system of marine laws now known. Some fragments of it have come down to modern times, and are found in the Pandects. (See Kent's Comm. III. 4, 5.)

Roy'al Fish. Whales and sturgeon. When cast ashore or caught near the coast they belonged to the king.

Rule. An order of court. A *rule nisi* is an order to show cause against a former act or determination, which is made *absolute*, unless (*nisi*) satisfactory cause be shown.

St. Germyn', Christopher. A distinguished law writer in the reign of Henry VIII. who wrote the *Doctor and Student*, which is in form a dialogue between a doctor of divinity and a student in the laws of England. Kent speaks of it as "a book of merit and authority." (Kent's Comm. I. 504.) The name is usually spelt Germain.

Sci're fa'cias. [Lat. "cause him to know," *i.e.* give him notice.] A writ commanding the sheriff to *give notice* to the person against whom it is issued that he show cause why a record, judgment, etc., shall not be enforced against him, or why some record or letters patent shall not be annulled.

Seign'ory. The lordship, manor, or domain of a feudal lord.

Sel'den, John. A distinguished lawyer and writer, born 1584, died 1654. He held various important public offices, and was for a long time a member of Parliament. His learning was very extensive and he wrote on many topics, both legal and other. His most noted work was the *Mare Clausum*, in which he defended the sovereignty of England over the narrow seas washing its coasts. He also issued an edition of Fleta, etc.

Shriev'alty. The office of a sheriff.

Sig'net. In England, a seal for the authentication of royal grants.

Sign-man'ual. A person's own name signed by himself; applied specially to the signature of a king or sovereign to official grants or documents.

Sim'ony. [From *Simon* Magus, who wished to buy the power of bestowing the Holy Spirit.] The offence of buying or selling ecclesiastical preferment.

Spel'man, Henry. An English writer, distinguished for his antiquarian researches. His *Glossary* is a valuable collection and explanation of the terms found in ancient records and other writings. Born in 1562, died in 1641.

Star-cham'ber. An English court of very ancient origin, which was new-modelled by statutes in the reigns of Henry VII. and Henry VIII. Its judges were privy-councillors, with two judges of the common-law courts, and they sat without a jury. It had important criminal jurisdiction, but in course of time it usurped unwarrantable powers, political as well as judicial, and exercised them with great injustice and wantonness, so that it was finally abolished by statute 16 Car. I. c. 10. The origin of the name is a matter of dispute. (See **Starr**, *post*, to which some refer the word.)

Starr (483). A name given anciently in England to contracts and obligations of Jews, from a corruption of the Hebrew word *shetar*, covenant. An

ordinance of Richard I. commanded these starrs to be enrolled and deposited in chests in certain places, one of which was a room in the Exchequer at Westminster; it has been supposed that this was called the *starr-chamber*, and that the court of the same name was so styled because held in such room.

Stat'ham, Nicholas. Baron of the Court of Exchequer in the reign of Edward IV. An abridgment of the Year Books to the end of Henry VI.'s reign is attributed to him, though it is not certainly known that he wrote it.

Staund'forde, William. Judge of the Court of Common Pleas from 1554 to 1558. He was the author of two valuable legal works, written in law-French, — a treatise on the *Pleas of the Crown*, and an *Exposition of the King's Prerogative*. (See Kent's Comm. I. 507.)

Subtrac'tion (663, 665). The withholding from some person of that to which he is lawfully entitled; as where an executor withholds a legacy from the legatee; or husband or wife lives apart from the other without proper cause; or the payment of church rates is withheld, etc.

Suf'fragan. An assistant bishop.

Supersedeas. [Lat. "supersede."] A writ issued to supersede some former writ, process, commission, etc., or stay all proceedings thereon.

Tal'liage. [Fr. *tailler*, to cut off.] Anciently in England a tax or rate imposed for the raising of government revenue; specially so-called when imposed upon cities and burghs.

Task. [Lat. *taxo*, to tax.] A tax.

Tith'ing-man. In English law (1) formerly, the chief of a tithing (see *Headborough*, *supra*); (2) in modern times, a constable.

Tourn. The *sheriff's tourn* was an inferior court of criminal jurisdiction in England, formerly held twice a year before the sheriff in different parts of his county. Now abolished.

Tra'verse. A denial; (as a verb) to deny.

Treas'ure-trove. [Fr. *trouver*, to find.] Treasure, as money, gold, silver, plate, or bullion, found hidden in the earth or other private place, its owner being unknown. By English law, it belongs to the king.

Tum'brel. (1) A dung-cart. (2) A ducking-stool, anciently used for the punishment of scolds.

Vav'asour. In feudal law, a vassal ranking next below a baron.

Verd'eror (90). [Fr. *verd*, green.] An officer in England whose care it was to protect the king's vert (greensward) and venison, and to inquire into offences against the same. The verderors held various courts for the trial of such offences.

Vill (792, 941). [Lat. *villa*, a country-house.] A town; a tithing.

Voir dire (794, 798). An examination upon the *voir dire* (Lat. *verum dicere*, to speak the truth) is a preliminary examination of a juror or witness, to ascertain whether he is competent or qualified to act in that capacity.

Wa'ger of Law. A proceeding formerly in use in England in actions of debt and detinue, whereby the defendant was allowed to exculpate himself

from liability, by taking his oath, that he did not owe the money, etc., as alleged by the plaintiff; his oath was followed by that of compurgators, who swore that they believed his statements. This practice was abolished in 1833, but had long before fallen into disuse. (See **Compurgators**.)

Waif. Goods stolen and *waived* or thrown away by the thief in his flight, for fear of being apprehended; by English law, they belonged to the king, if seized by some one for his use. But here such goods may be reclaimed by the true owner.

Weregild (936). [Sax. *wer*, man, and *gild*, money.] A private pecuniary satisfaction paid by a person who had committed murder or other enormous offence, to the party injured or his relatives. Under Saxon laws, the sums to be paid for homicide were clearly defined, being greater or less according to the rank of the victim. This payment took the place of punishment.

II.

A Translation of Expressions from the Latin, French, and other Languages, used by Blackstone.

[The arrangement is alphabetical, and each phrase will be found under the letter which is the initial letter of its first word. A few foreign expressions, which are translated and explained by Blackstone himself, are not included in this table.]

A fortiori. With stronger reason.

A mensa et thoro. From bed and board.

A natiuitate. From birth.

A vinculo matrimonii. From the bond of marriage.

Ab ardendo. From burning.

Ab initio. From the beginning.

Ab intestato. From an intestate.

Absolutum et directum dominium. Absolute and direct ownership.

Accessorium non ducit, sed sequitur, suum principale. That which is accessory does not carry with it, but itself follows, its principal.

Accessorius sequitur naturam sui principalis. An accessory follows the nature of his principal.

Actio personalis moritur cum persona. A personal action dies with the person.

Actiones in personam, quæ adversus eum intenduntur, qui ex contractu vel delicto obligatus est aliquid dare vel concedere. Personal actions, which are directed against him who, by reason of contract or tort, is under obligation to give or grant something.

Actores fabulæ. Actors of the fable.

Actus Dei nemini facit injuriam. The act of God does injury to no one.

Ad annum vigesimum primum, et eo usque juvenes sub tutelam reponunt. To the twenty-first year, and until that time they place their youths under guardianship.

Ad assisas capiendas. For taking the assizes.

Ad colligendum bona defuncti. For collecting the goods of the deceased.

Ad deliberandum. For deliberating.

Ad exheredationem. To the disinherison.

Ad faciendum, subjiciendum, et recipiendum. To do, submit to, and receive.

Ad instructiones reparationesque itinerum et pontium, nullum genus hominum nulliusque dignitatis ac venerationis meritis, cessare oportet. As re-

spects the construction and repair of roads and bridges, no class of men and none, whatever be their dignity or the reverence for their merits, ought to be exempt.

Ad libitum. At pleasure.

Ad litem. For a suit; for a litigation.

Ad nocumentum liberi tenementi sui. To the injury of his freehold.

Ad ostium ecclesiæ. At the church door.

Ad prosequendum, testificandum, deliberandum. For prosecuting, testifying, deliberating.

Ad quod damnum. To what damage.

Ad respondendum. To answer.

Ad satisfaciendum. To satisfy.

Ad studendum et orandum. For study and prayer.

Ad subjiendum. To submit to.

Ad testificandum. To testify; for testifying.

Advocati fisci. Advocates of the revenue.

Æquitas sequitur legem. Equity follows the law.

Ætas infantie proxima. The age next to infancy.

Ætas pubertati proxima. The age next to puberty.

Aliiter quam ad virum, ex causa regiminis et castigationis uxoris suæ, licite et rationabiliter pertinet. Otherwise than lawfully and reasonably belongs to a man for the sake of government and correction of his wife.

Animo furandi. With intent to steal.

Animo revertendi. With the intention of returning.

Animum revertendi. The intention of returning.

Animum testandi. The intent to make a will.

Animus (or animum) furandi. Intent to steal.

Apprenticii ad legem. Apprentices to the law.

Arcta et salva custodia. Close and safe custody.

Articuli super cartas. Articles concerning the charters.

Assumpsit. He undertook.

Aula regiâ; aula regis. The king's hall; the king's court.

Autrefois acquit. Formerly acquitted.

Autrefois attaint. Formerly attainted.

Autrefois convict. Formerly convicted.

Belluinas, atque ferinas, immanesque Longobardorum leges accepit. Received the savage, wild, and barbarous laws of the Lombards.

Benigne interpretamur chartas propter simplicitatem laicorum. We interpret deeds (or writings) liberally, on account of the ignorance of the laity.

Bona notabilia. Goods of notable value; (i.e. sufficient to give the Prerogative Court jurisdiction, viz. £5 after A.D. 1603).

Bona vacantia. Goods wanting an owner.

Boni homines. Good men.

Brevia testata. Writs (or deeds) witnessed.

Burgi latrocinium. Robbery of a walled town.

Campum partire. To divide the land.

Capias. Take; arrest.

Capias ad respondendum. Arrest [the defendant] to answer [to the plaintiff].

Capias ad satisfaciendum. Arrest [the debtor] to satisfy [a judgment].

Capias utlagatum. Arrest the outlaw.

Capitales, generales, perpetui, et majores; a latere regis residentes, qui omnium aliorum corrigere tenentur injurias, et errores. Chief, general, permanent, and superior; who attend the king, and are bound to correct the wrongs and errors of all the others.

Capitalis justiciarius totius Angliæ. Chief justiciary of all England.

Capitula de Judæis. Schedules (or registers) concerning the Jews.

Caput lupinum. A wolf's head.

Cassetur. That it be quashed.

Casus omissus. A case omitted, (i.e. unprovided for).

Causa jactitationis matrimonii. An action for boasting of marriage.

Causa mortis. On account of death.

Causa venationis. On account of hunting.

Census regalis. The royal property (or revenue).

Cepi corpus. I have taken the body.

Cepit et asportavit. •He took and carried away.

Certiorari facias. Cause to be certified.

Cessante ratione, cessat et ipsa lex. The reason ceasing, the law itself ceases.

Cestui, que doit inheriter al pere, doit inheriter al fils. He who would have been heir to the father [of the deceased], shall be heir to the son.

Cestui que use. He who benefits by the use.

Cestui que trust. He who benefits by the trust.

Cestui que vie. He whose life measures the estate.

Chirographa. Handwritings.

Cirographum. Handwriting.

Circumspecte agatis. That ye act circumspectly.

Civiliter mortuus. Civilly dead.

Clausum fregit. He broke the close.

Cognovit actionem. He has confessed the action.

Collatio bonorum. A collecting of goods [for equal division].

Comes stabuli. The count of the stable.

Commune vinculum. The common bond.

Communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo. Let not common pleas follow the King's Court, but be held in some certain place.

Concordia discordantium Canonum. A harmonizing of discordant canons.

Concubitu prohibere vago. To restrain from promiscuous intercourse.

Confirmatio chartarum. Confirmation of charters.

Consensus, non concubitus, facit nuptias. Consent, not cohabitation, makes a marriage.

Consideratum est per curiam. It is considered by the court.

Constat de persona. It identifies the person.

Contestatio litis. Contestation of suit.

Contra bonos mores. Against good morals.

Contra omnes homines fidelitatem fecit. He bound himself to fealty against all men.

Contra pacem. Against the peace.

Coram ipso rege. Before the king himself.

Coram non iudice. Before a judge (or court) having no jurisdiction.

Coram paribus. Before the peers.

Corpora corporata. Bodies corporate.

Corpus juris canonici. The body of the canon law.

Corpus juris civilis. The body of the civil law.

Couchant. Lying down.

Creamus, erigimus, fundamus, incorporamus. We create, we establish, we found, we incorporate.

Crepusculum. Twilight.

Crimen animo felleo perpetratum. A crime perpetrated with a bitter intention.

Crimen falsi. The crime of deception, (or falsifying).

Crimen læsæ majestatis. The crime of injuring majesty; the offense of leze-majesty.

Cui libet in sua arte credendum est. Every one is to be believed in his own art.

Cujus est solum, ejus est usque ad cælum. Who owns the soil, owns it as far as heaven.

Cujus est divisio, alterius est electio. Whichever has the division, the other has the choice.

Culpæ adnumerantur, veluti si medicus curationem dereliquerit, male quæmpiam secuerit, aut perperam ei medicamentum dederit. Are accounted faults, as if a physician has abandoned an attempt to cure, has operated upon some one unskilfully, or has given him the wrong medicine.

Cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invadiari. Since in such case the same thing may be pledged, both earlier and later, to many other creditors.

Cum olim in usu fuisset, alterius nomine agi non posse, sed, quia hoc non minimam incommoditatem habebat cæperunt homines per procuratores litigare. Though it was formerly the practice that one man could not plead in another's name, yet, since this occasioned very great inconvenience, men began to appear in lawsuits by attorneys.

Cum testamento annexo. With the will annexed.

Curie Christianitatis. The Christian (or ecclesiastical) courts.

Custodes (or *conservatores*) *pacis.* Guardians (or preservers) of the peace.

Custodiam comitatus. Protection of the county.

Custos horrei regii. Guardian of the royal granary

Custos rotulorum. The keeper of the rolls.

Damage-feasant. Doing damage.

Damnum absque injuria. Damage without injury; (*i.e.* without legal wrong).

Datum. A fundamental principle.

De bonis defuncti primo deducenda sunt ea quæ sunt necessitatis, et postea quæ sunt utilitatis, et ultimo quæ sunt voluntatis. From the goods of the deceased are first to be deducted all those which are of necessity, and afterwards those which are of utility, and lastly those which are given by will.

De bonis non. Of the goods not [yet administered].

De bono et malo. For good and ill.

De capitalibus dominis feodi. Of the chief lords of the fee.

De computo. Concerning an account.

De coronatore eligendo. For choosing a coroner.

De coronatore exonerando. For removing a coroner.

De corpore comitatus. From the body of the county.

De custodia terræ et hæredis. For the guardianship of the land and the heir.

De debitore in partes secando. Concerning the cutting of a debtor in pieces.

De donis conditionalibus. Concerning conditional gifts.

De estoveriis habendis. Concerning the obtaining of estovers.

De facto. In fact; actually; in fact, but without lawful title.

De filio, vel filia, rapto vel abducto. For the taking away or abduction of a son or daughter.

De frangentibus prisonam. Concerning those who break prison.

De injuriis. Concerning injuries.

De jure. Of right; rightfully; by lawful title.

De la plus belle. Of the fairest, (*i.e.* from the best part of the husband's estate).

De mercatoribus. Concerning merchants.

De militibus. Concerning knights.

De minimis non curat lex. The law does not care for trifles.

De novo. Anew; afresh.

De officio coronatoris. Concerning the office of coroner.

De pace, et legalitate, tuenda. For preserving the peace and lawful conduct.

De probioribus et potentioribus comitatus sui in custodes pacis. From the more worthy and powerful of his county as guardians of the peace.

De proprietate probanda. For proving property.

- De rationabili parte bonorum.* Concerning a reasonable part of the goods.
- De religiosis.* Concerning religious persons.
- De retorno habendo.* For having a return.
- De uxore rapta et abducta.* For the taking away and abduction of a wife.
- De ventre inspiciendo.* For inspecting the womb.
- De vicineto.* From the neighborhood.
- Decem tales; octo tales.* Ten such men; eight such men.
- Decretalia Gregorii Noni.* The Decretals of Gregory the Ninth.
- Decretum Gratiani.* The Decree of Gratian.
- Dedi.* I have given.
- Dedi et concessi.* I have given and granted.
- Dedimus potestatem.* We have given power.
- Dent operam consules, ne quid respublica detrimenti capiat.* Let the consuls take care that the republic receive no harm.
- Dernier resort.* Last resort.
- Devenio vester homo.* I become your man.
- Dies fasti et nefasti.* Judicial and non-judicial days.
- Distringas.* Distrain; levy a distress upon.
- Diversité des courtes.* The diversity of courts.
- Do ut des.* I give that you may give.
- Do ut facias.* I give that you may do.
- Doli capax* (plural, *capaces*). Capable of evil doing.
- Doli incapax.* Incapable of evil doing.
- Dominium directum.* Direct (or absolute) ownership.
- Dominium utile.* Ownership by way of use.
- Dominus capitalis feodi loco hæredis habetur, quoties per defectum vel delictum extinguitur sanguis tenentis.* The chief lord of the fee takes the place of heir, as often as by defect [of heirs], or by attainder, the blood of the tenant becomes extinct.
- Dominus manerii.* The lord of the manor.
- Domitæ naturæ.* Of tame nature.
- Domus mansionalis Dei.* The mansion house of God.
- Donatio feudi.* The gift of a feud.
- Donatio mortis causa.* A gift by reason of death.
- Donatio stricta et coarctata; sicut certis hæredibus, quibusdam a successionē exclusis.* A gift restrained and confined; as to particular heirs, some being excluded from the succession.
- Donationes sint stricti juris, ne quis plus donasse præsumatur quam in donatione expresserit.* Gifts are of strict right, that no one may be presumed to have given more than he has expressed in the gift.
- Dos rationabilis.* Reasonable dowry.
- Dotalitium.* Dowry.
- Droit d'aubaine.* The right to an alien's property.
- Duas uxores eodem tempore habere non licet.* It is not lawful to have two wives at the same time.

Dum bene se gesserit. During good behavior.

Dum fuit non compos mentis suæ, ut dicit, etc. While he was of unsound mind, as he says, etc.

Duplicem valorem maritaggi. Double the value of the marriage.

Durante absentia. During the absence [of the executor].

Durante bene placito. During the good pleasure [of the king].

Durante minore ætate. During minority.

Durante viduitate. During widowhood.

E converso. Conversely; vice versa.

Ea sunt animadvertenda peccata maxime, quæ difficilime præcaventur. Those transgressions are to be most severely punished which are with most difficulty guarded against.

Eat inde sine die. May go thereof without day.

Ei incumbit probatio, qui dicit, non qui negat; cum per rerum naturam factum-negantis probatio nulla sit. The proving lies upon him who affirms, not upon him who denies; since by the nature of things there is no proving by one who denies a fact.

Ejectione firmæ. Ejectment from a farm. (See page 464.)

Elegit. He has chosen.

Emptionis-venditionis contractæ argumentum. Evidence of a contract of purchase and sale.

Eo instanti. Upon the instant.

Erant omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset. All things were common and undivided among all, as if there were a common inheritance to all.

Esse optime constitutam rempublicam quæ ex tribus generibus illis, regali, optimo, et populari, sit modice confusa. That that is the best established republic which consists of these three kinds [of government] properly intermixed, the monarchic, the aristocratic, and the democratic.

Esto perpetua. May it be perpetual.

Et sequitur aliquando pœna capitalis, aliquando perpetuum exilium, cum omnium bonorum ademptione. And sometimes capital punishment follows, sometimes perpetual exile, with the loss of all his goods.

Et stet nomen universitatis. And the name of corporation may continue.

Eum qui nocentem infamat, non est æquum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit. It is not just and right that he who charges an offender with his wrong-doing should be condemned on this account; for it is proper and expedient that the wrongs done by offenders should be made known.

Ex æquo et bono. In justice and right.

Ex arbitrio judicis. By the will of the judge.

Ex assensu patris. With the father's consent.

Ex contractu. From contract.

Ex debito justitiæ. As a debt of justice; as a just right.

Ex delicto. From tort.

Ex donatione regis. By gift from the king.

Ex donationibus, servitia militaria vel magnæ serjantiæ non continentibus, oritur nobis quoddam nomen generale, quod est socagium. From gifts not involving knight services or the services of grand serjeanty, arises a certain general name, which is socage.

Ex gratia. As matter of favor.

Ex necessitate legis. From legal necessity.

Ex nudo pacto non oritur actio. No action arises from a nude pact; (*i.e.* a contract without consideration).

Ex officio. By virtue of his office.

Ex post facto. After the act.

Ex quibus rex unum confirmabat. Of whom the king confirmed one.

Ex speciali gratia, certa scientia, et mero motu regis. From the special favor, certain knowledge, and unsolicited action of the king.

Ex vi termini. By force of the term.

Ex visitatione Dei. By the visitation of God.

Exigent. They shall require [him to surrender himself].

Exigi facias. Cause him to be required [to surrender himself].

Expeditio contra hostem, arcium constructio, et pontium reparatio. An expedition against the enemy, the construction of castles, and the reparation of bridges.

Extendi facias. Cause [the lands, etc.] to be extended; (*i.e.* to be valued at their full value).

Extra quatuor maria. Beyond the four seas.

Extravagantes Communes. The Common Extravagants.

Extravagantes Joannis. The Extravagants of John; [so called as extending (*vagantes*) beyond (*extra*) the original canon law].

Facio ut des. I do that you may give.

Facio ut facias. I do that you may do.

Felo de se. A felon of himself; a self-murderer; a suicide.

Felonice. Feloniously.

Feoda propria et impropria. Proper and improper feuds.

Feræ naturæ. Of a wild nature.

Feuda individua. Indivisible feuds.

Feudum antiquum. An ancient feud.

Feudum apertum. An open feud.

Feudum avitum. An ancestral feud.

Feudum novum. A new feud.

Feudum paternum. A paternal feud.

Fief d'haubert. A military feud. (Literally, by coat of mail.)

Fieri. To be made up; to become.

Fieri facias. Cause to be made [of the judgment debtor's property a certain sum].

Filius nullius. A son of nobody.

Filius populi. A son of the people.

Fit juris et seisinæ conjunctio. There is a union of right and seizin.

Fiunt. They become so.

Flagellis et fustibus acriter verberare uxorem. To beat his wife severely with whips and cudgels.

Fœmina viro co-operta. A woman under the cover (or protection) of her husband; a married woman.

Fœnus nauticum. Marine interest.

Fundatio incipiens. The original foundation.

Fundatio perficiens. The efficient (or effectual) foundation.

Furem, si aliter capi non posset, occidere permittunt. Allow the killing of a thief, if he cannot otherwise be taken.

Furiosus furore solum punitur. A madman is punished by his madness alone.

Gildam mercatoriam. A mercantile association (or assembly).

Habeas corpora. That you have the bodies.

Habeas corpora juratorum. That you have the bodies of the jurors.

Habeas corpus. That you have the body.

Habeas corpus ad respondendum. That you have the body to answer.

Habeas corpus ad subjiciendum. That you have the body to submit to.

Habeas corpus cum causa. That you have the body with the cause [of his detention].

Habere facias possessionem. Cause him to have possession.

Habere facias seisinam. Cause him to have seizin.

Habiles ad matrimonium. Fit for marriage.

Habitum et tonsuram clericalem. The clerical habit and tonsure.

Hæredes maritentur absque disparagatione. Heirs are to be married without disparagement.

Hæreditas jacens. An inheritance lying open, (*i.e.* unoccupied).

Hæreditas nunquam ascendit. An inheritance never ascends.

Hæres factus. An heir by reason of appointment.

Hæres natus. An heir by reason of birth.

His testibus, Johanne Moore, Jacobo Smith, et aliis, ad hanc rem convocatis. Witness these persons, John Moore, Jacob Smith, and others, for this purpose assembled.

Hoc quidem perquam durum est, sed ita lex scripta est. This is indeed very hard, but so the law is written.

Homicidium quod nullo vidente, nullo sciente, clam perpetratur. Homicide which is committed secretly, no one seeing, no one knowing it.

Honorarium. An honorary fee; recompense from gratitude.

Honoris causa. As a mark of honor.

Hostis humani generis. An enemy of the human race.

Id certum est, quod certum reddi potest. That is certain which can be rendered certain.

Id tenementum dici potest socagium. This tenure may be called socage.

Ignorantia juris, quod quisque tenetur scire, neminem excusat. Ignorance of the law, which every one is bound to know, excuses no one.

Ignoscitur ei qui sanguinem suum qualiter qualiter redemptum voluit. He is excused who has been willing to save his life in any manner whatever.

Illicitum collegium. An unlawful association.

Illud dici poterit feodum militare. That is to be called a military feud.

Immoderate suo jure utatur, tunc reus homicidii sit. If he exercises his right immoderately, then he is guilty of murder.

Imperator solus et conditor et interpres legis existimatur. The emperor alone is deemed both the maker and the interpreter of the law.

Impotentia excusat legem. Impossibility is an excuse in law.

In auter droit. In another's right.

In bonis, in terris, vel persona. In goods, in lands, or in person.

In Britannia tertia pars bonorum decedentium ab intestato in opus ecclesiæ et pauperum dispensanda est. In Britain a third part of the goods left by an intestate are to be distributed for the needs of the church and of the poor.

In capita. To the polls, (*i.e.* heads, or individuals).

In capite. In chief.

In crastino animarum. On the morrow of All Souls.

In esse. In being; in existence.

In extremis. In his last moments; at the point of death.

In facie ecclesiæ. In the face (*or* presence) of the church.

In facie ecclesiæ et ad ostium ecclesiæ; non enim valent facta in lecto mortali, nec in camera, aut alibi ubi clandestina fuere conjugia. In the face of the church and at the church door; for those made upon a death bed, or in a chamber, or elsewhere where clandestine marriages are made, are not valid.

In favorem vitæ. In favor of life.

In feudis vere antiquis. In feuds truly ancient.

In fictione juris semper subsistit æquitas. In a fiction of law equity always abides.

In foro conscientiæ. In the tribunal of conscience.

In foro contentioso. In a court of litigation.

In fraudem legis. In circumvention of the law.

In futuro. In the future.

In infinitum. For ever.

In loco parentis. In the place of a parent.

In misericordia domini regis pro falso clamore suo. In the king's mercy for his false claim.

In mortua manu. In a dead hand; in mortmain.

In obsequio domini regis vel alicujus episcopi. In the service of the lord the king, or of some bishop.

In perpetuum rei testimonium. As perpetual evidence of the matter.

- In personam.* Against the person.
- In pios usus.* For pious uses.
- In potentia.* In potential existence; in possibility.
- In potestate parentis.* Under parental power.
- In præsenti.* At present; at once; now.
- In rem.* Against the thing; against the property.
- In rerum natura.* In nature; in existence; in life.
- In statu quo.* In the state in which [things were]; in the former condition.
- In transitu.* In transit; in course of transfer.
- In ventre sa mere.* In his mother's womb.
- Incendit et combussit.* He set on fire and burned.
- Incertam et caducam hereditatem relevabat.* It raised up an uncertain and fallen inheritance.
- Incolæ territorii.* Inhabitants of the territory.
- Indebitatus assumpsit.* Being indebted, he undertook.
- Infra annum luctus.* Within the year of mourning.
- Inhumanum erat spoliatum fortunæ suis in solidum damnari.* It was inhuman that one deprived of all his fortune should be condemned to make payment in full.
- Inops consilii.* Without counsel.
- Inquisitio post mortem.* An inquisition after death.
- Insimul computassent.* Had settled their accounts together.
- Instar dentium.* Like teeth.
- Instar omnium.* Equivalent to all; an example of all.
- Interest reipublicæ ut sit finis litium.* It is to the advantage of the state that there should be a limit to litigation.
- Intra mœnia.* Within the walls.
- Intra præsidia.* Within a protected place.
- Ipsius patris beneplacito.* By the gracious favor of his father.
- Ipso facto.* From the fact itself; in itself.
- Is cui cognoscitur.* He to whom the recognizance is given.
- Is qui cognoscit.* He who gives the recognizance.
- Istud homicidium, si fit ex livore, vel delectatione effundendi humanum sanguinem, licet juste occidatur iste, tamen occisor peccat mortaliter, propter intentionem corruptam.* If such homicide he committed through malice or from the pleasure of shedding human blood, though he be justly slain, nevertheless the slayer sins mortally on account of his corrupt intention.
- Ita maritentur ne disparagentur, et per consilium propinquorum de consanguinitate sua.* Let them so be married as not to be disparaged, and under the advice of their next of kin.
- Ite et inter vos causas vestras discutite, quia dignum non est ut nos judicemus Deos.* Go and discuss your causes among yourselves, because it is not fit that we should judge gods.

Feo faile. I have made a mistake; I have committed error.

Judex de ea re cognoscet. The judge shall investigate this matter.

Judicandum est legibus, non exemplis. The question must be determined by the laws, not by the examples.

Judices delegati. Judges delegate.

Jura fiscalia. Fiscal rights; financial rights.

Jura personarum. Rights of persons.

Jura regalia. Royal rights.

Jura rerum. Rights of things.

Jura summi imperii. The rights of sovereign power.

Juramentum fidelitatis. The oath of fealty.

Jure civili. By the civil law.

Jure divino. By divine law.

Jure gentium. By the law of nations.

Jure naturæ. By the law of nature.

Jure representationis. By the right of representation.

Jure uxoris. In his wife's right.

Juris et seisinæ conjunctio. The union of right and seizin.

Juris naturalis aut divini. Of natural or divine law.

Juris positivi. Of positive law.

Juris præcepta sunt hæc, honeste vivere, alterum non lædere, suum cuique tribuere. The precepts of the law are these: to live honestly, to injure no one, and to give every man his due.

Jus accrescendi. The right of increase; the right of survivorship.

Jus ad rem. A right to a thing.

Jus albinatus. The right to an alien's property.

Jus civile est quod quisque sibi populus constituit. The civil law is that which each nation has established for itself.

Jus commune. The common right; the common law.

Jus gladii. The right of the sword; the right to execute the law.

Jus in re. A right in a thing.

Jus non scriptum. The unwritten law.

Jus postliminii. The right of *postliminium*. (See Appendix I.)

Jus prætorium. The right of the prætor.

Jus proprietatis. The right of property.

Jus prosequendi in judicio quod alicui debetur. The right of suing in a court for what is due to one.

Jus trium liberorum. The right from having three children.

Justiciarii ad omnia placita. Justices for all pleas.

Justiciarii in itinere. The itinerant justices.

Κατ' ἐξοχήν. Preëminently.

Leges non scriptæ. Unwritten laws.

Leges posteriores priores contrarios abrogant. Subsequent laws repeal former laws which are inconsistent with them.

Leges scriptæ. Written laws.

Leges sola memoria et usu retinebant. They retained their laws only by memory and custom.

Leges sub graviore lege. Laws under a superior law.

Legibus patriæ optime instituti. Best instructed in the laws of their country.

Legum Anglicanarum conditor. The founder of English laws.

Levant. Rising up.

Levari facias. Cause to be levied.

Lex Cornelia de sicariis. The Cornelian law concerning assassins.

Lex Hostilia de furtis. The Hostilian law concerning thefts.

Lex Julia majestatis. The Julian law of majesty.

Lex mercatoria. The law merchant.

Lex neminem cogit ad vana, seu impossibilia. The law compels no one to do idle or impossible things.

Lex non exacte definit, sed arbitrio boni viri permittit. The law does not exactly define, but leaves to the discretion of a good man.

Lex non scripta. The unwritten law.

Lex scripta. The written law.

Libelli famosi. Defaming libels.

Liber et legalis homo. A free and lawful man.

Liber Judicialis. The judicial book.

Liberam legem. One's right as a free man.

Liberos et legales homines, de vicineto. Free and lawful men from the neighborhood.

Liberum animum testandi. Free will in making a will.

Liberum et commune socagium. Free and common socage.

Licentia loquendi. Leave to talk.

Licet apud consilium accusare quoque, et discrimen capitis intendere. It is permitted also to make accusations before the council, and to prosecute for capital crimes.

Locatio vel conductio. A letting or hiring.

Lucri causa. For the sake of gain.

Mala grammatica non vitiat chartam. Bad grammar does not vitiate a deed.

Mala in se. Acts wrongful in themselves; acts morally wrongful.

Mala praxis. Malpractice.

Mala prohibita. Acts wrongful because the law prohibits them.

Malitia supplet ætatem. Malice makes up for lack of age.

Malo animo. With evil intent.

Malus usus abolendus est. An evil custom ought to be abolished.

Mancipia, quasi manu capti. Mancipia, as if taken by hand.

Manerium, a manendo. A manor from there abiding (or residing).

Manes. Departed spirit.

Mansueta, quasi manni assueta. [Are called] *mansueta* (i.e. tamed) as being accustomed to the hand.

Manu forti. With strong hand.

Membrum pro membro. Member for member.

Meum and tuum. Mine and thine.

Mittere in confusum cum sororibus, quantum pater aut frater ei dederit, quando ambulaverit ad maritum. To put into a common mass for division with her sisters as much as her father or brother gave her when she was married.

Mittimus. We send.

Modicam castigationem adhibere. To inflict moderate punishment.

Modus decimandi. A peculiar mode of tithing [established by custom]; a composition for tithes.

Modus legem dat donationi. The manner [of giving] prescribes the law of the gift. The terms of the gift determine the extent of interest conveyed.

Modus levandi fines. The mode of levying fines.

Molliter manus imposuit. He laid hands upon him gently.

Mons sacer. The sacred mount.

Monstrans de droit. A manifestation (or plea) of right.

Mutatis mutandis. The necessary changes being made; with names, titles, etc., changed as may be necessary.

Nam de minimis non curat lex. For the law does not care for trifles.

Nam ex antecedentibus et consequentibus fit optima interpretatio. For the best interpretation is made by considering the preceding and following parts, (i.e. the whole context).

Nam feudum sine investitura nullo modo constitui potuit. For a feud can in no way be created without investiture.

Nam leges vigilantibus, non dormientibus, subveniunt. For the laws aid the vigilant, not those who sleep upon their rights, (i.e. the careless or indifferent).

Nam nemo est hæres viventis. For no one is the heir of a living person.

Nam omne crimen ebrietas, et incendit et detegit. For drunkenness both enkindles and discloses every crime.

Nam omne testamentum morte consummatum est; et voluntas testatoris est ambulatoria usque ad mortem. For every testament takes effect at death; and the will of the testator is changeable until the very time of death.

Nam qui facit per alium, facit per se. For he who does a thing by another, does it by himself.

Nam qui hæret in litera, hæret in cortice. For he who adheres to the letter, adheres to the mere outer shell, (i.e. regards the mere words and not the true intent).

Nam, qui non prohibet, cum prohibere possit, jubet. For he who does not prohibit, when he can prohibit, commands.

Nam quod semel meum est, amplius meum esse non potest. For what is once mine, cannot be mine more completely.

Nam verba debent intelligi cum effectu, ut res magis valeat quam pereat. For words ought to be understood so as to have an effect, in order that the matter may rather avail than perish.

Ne exeat regno. That he may not leave the realm.

Ne faciat vastum vel estrepementum pendente placito dicto indiscusso. That he commit no waste or estrepement during the pendency of the suit.

Ne quis plus donasse præsumatur quam in donatione expresserit. That no one may be presumed to have given more than he has expressed in the gift.

Necessitas culpabilis. A culpable necessity.

Nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum et per iudicium parium suorum. That no one shall lose his benefice, except in accordance with the custom of our ancestors and by the judgment of his peers.

Nemo est hæres viventis. No one is the heir of a living person.

Nemo in propria causa testis esse debet. No one ought to be a witness in his own cause.

Nemo tenebatur prodere seipsum. No one was bound to betray himself.

Nemo tenetur seipsum accusare. No one is bound to accuse himself.

Nihil dicit. He says nothing.

Nil debet. He owes nothing.

Nisi convenissent in manum viri. Unless they had come under their husbands' power.

Nisi per legale iudicium parium suorum vel per legem terræ. Except by the lawful judgment of his peers or by the law of the land.

Nisi prius. Unless before. (See page 650.)

Nocturna diruptio alicujus habitaculi, vel ecclesiæ, etiam murorum portarumve burgi, ad feloniam perpetrandum. The breaking at night of any habitation, or church, or even the walls or gates of a walled town, in order to commit a felony.

Nomen generalissimum. The most general name.

Non compos mentis. Not of sound mind.

Non est factum. It is not his deed.

Non est inventus. He is not found.

Non jus, sed seisina, facit stipitem. Not the right, but seizin, makes the stock, (*i.e.* the source of descent or inheritance).

Non obstante. Notwithstanding; (*i.e.* license or authority to do an act notwithstanding any law to the contrary).

Non obstante aliquo statuto in contrarium. Notwithstanding any statute to the contrary.

Non potest rex gratiam facere cum injuria et damno aliorum. The king cannot grant a pardon attended by injury and detriment to others.

Non prosequitur. He does not prosecute.

Non sequitur clamorem suam. He does not follow up his claim.

Non sum informatus. I am not informed.

Non suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem; talis enim debet esse metus, qui in se contineat vitæ periculum, aut corporis cruciatum. Not the suspicion of a weak and timid man, but such as may happen to a resolute man; for the fear ought to be such as contains in itself danger to life or torture of the body.

Nudum pactum. A nude pact; a contract without consideration.

Nul tiel record. No such record.

Nul tort; nul disseizin. No wrong done; no disseizin.

Nulli vendemus, nulli negabimus aut differemus, rectum vel justitiam. To no one will we sell, to no one deny or delay, right or justice.

Nullius filius. The son of nobody.

Nullum simile est idem. No similar thing is the same thing.

Nullum tempus occurrit regi. No time runs against the king.

Nullus liber homo aliquo modo destruat, nisi per legale judicium parium suorum aut per legem terræ. No free man shall be in any way destroyed, except by the lawful judgment of his peers or by the law of the land.

Nullus liber homo capiatur, vel imprisonetur, aut exuletur, aut aliquo modo destruat, nisi per legale judicium parium suorum, vel per legem terræ. No free man shall be taken, or imprisoned, or exiled, or in any way destroyed, except by the lawful judgment of his peers or by the law of the land.

Ob alterius culpam tenetur, sive servi, sive liberi. Is held liable for the fault of another, whether slave or freedman.

Officina gentium. The fountain-head of nations.

Officina justitiæ. The office of justice.

Omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti, habeant et teneant se semper bene in armis et in equis, ut decet et oportet; et sint semper prompti et bene parati, ad servitium suum integrum nobis explendum et peragendum, cum opus fuerit: secundum quod nobis debent de feodis et tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri prædicti. Let all counts, and barons, and knights, and vassals, and all free men of our whole kingdom aforesaid, have and hold themselves at all times well provided with arms and horses, as is fitting and proper; and let them be always ready and well prepared for fulfilling and accomplishing their full service to us, when need shall require; according to what they ought rightfully to do for us, by reason of their feuds and tenements, and as we have decreed for them by the common council of our whole kingdom aforesaid.

Omni exceptione majores. Superior to every exception.

Omni quoque corporali cruciatu semoto. All bodily torture also being done away with.

Omnia catalla cedant defuncto; salvis uxori ipsius et pueris suis rationabilibus partibus suis. All the chattels shall fall under the disposition made by the deceased, saving to his wife and children their reasonable parts.

Omnibus qui reipublicæ præsumt etiam atque etiam mando, ut omnibus æquos se præbeant judices, perinde ac in judiciali libro scriptum habetur; nec quicquam formident quin jus commune audacter libereque dicant. I again and again command all who are set over the state, that they show themselves just judges to all, as is written in the judicial book, [or the dome-book]; and that no fear deter them from declaring the common law boldly and freely.

Omnium rerum immunitatem. Exemption from all things.

Ore tenus. By word of mouth.

Ousterlemain. Delivery from the hand.

Oyer and terminer. To hear and determine.

Pancratium. A gymnastic contest with wrestling and boxing.

Parens patriæ. Father of his country.

Pares curiæ; pares curtis. Peers of the court.

Pares debent interesse investituræ feudi, et non alii. The peers ought to be present at the investiture of the fief, and not others.

Pars illa communis accrescit superstitibus, de persona in personam, usque ad ultimam superstitem. That common part accrues to survivors, from person to person, even to the last survivor.

Pars mulctæ regi, vel civitati, pars ipsi, qui vindicatur vel propinquis ejus, exsolvitur. A part of the fine is paid to the king or to the state, a part to him who is injured or to his relations.

Pars rationabilis. A reasonable part.

Partem per toto. A part for the whole.

Particeps criminis. An accomplice in the crime.

Partus sequitur ventrem. The offspring follow the womb, (i.e. the *status* of the mother).

Parvum servitium regis. Petit serjeanty of the king. (Literally, petty service of the king.)

Pater aut mater defuncti, filio non filiæ, hæreditatem relinquunt. . . . Qui defunctus non filios sed filias reliquerit, ad eas omnis hæreditas pertineat. The father or mother at death shall leave the inheritance to the son, not to the daughter; and if a man at death leaves no sons, but only daughters, the whole inheritance shall belong to them.

Pater est quem nuptiæ demonstrant. He is the father whom the marriage designates.

Pater familias. The father (or head) of a family.

Patria potestas in pietate debet, non in atrocitate, consistere. Parental power should consist in affection, not in cruelty.

Peccatum illud horribile, inter Christianos non nominandum. That horrible crime, not to be named among Christians.

Peculium. Private property.

Peine forte et dure. Strong and hard punishment.

Pendente lite. Pending the suit; during the litigation.

Pendente placito. Pending the suit.

Per auter vie. For another's life.

Per capita. By heads; as individuals; share and share alike.

Per formam doni. By the form of the gift.

Per industriam. By industry.

Per infortunium. By misadventure.

Per laudamentum sive iudicium parium suorum. By the award or judgment of his peers.

Per magnum servitium. By grand serjeanty. (Literally, by great service.)

Per minas. By threats.

Per quod. By which. (See page 681.)

Per quod consortium amisit. By which he lost the companionship [of his wife].

Per quod servitium amisit. By which he lost the service.

Per servitium militare. By knight service; by military service.

Per stirpes. By stocks; as representing the stocks; (*i.e.* ancestors who are the "stocks" or sources of descent).

Per testes. By witnesses.

Per verba de futuro. By words in the future tense.

Per verba de presenti. By words in the present tense.

Per vinum delapsis capitalis pœna remittitur. Capital punishment is remitted for those who have fallen through wine.

Pia fraus. A pious fraud.

Placita de debitis, quæ fide interposita debentur, vel absque interpositione fidei, sint in justitia regis. Let all pleas of debt, which are due, whether a claim of good faith be interposed or not, be in the king's justice, (*i.e.* be in the jurisdiction of the king's court).

Plegios de prosequendo. Pledges to prosecute.

Plegios de retorno habendo. Pledges for having a return.

Plenum dominium. Full ownership.

Posse comitatus. The power of the county.

Possessio fratris facit sororem esse hæredem. The possession of the brother makes the sister heir.

Post fine. A subsequent fine.

Potentia propinqua. A near possibility.

Potentia remotissima. A most remote possibility.

Præcipe quod reddat. Command that he render.

Prædia volantia. Volatile estates.

Præsumitur pro legitimatione. The presumption is in favor of legitimacy.

Præteritorum memoria eventorum. The remembrance of past events.

Prerogativa regis. The royal prerogative.

Pretium feudi. The price of a fief.

Prima facie. At first view.

Prima seisina; Primer seizin. The first seizin.

Primer fine. First fine.

Pro confesso. As confessed.

Pro corpore comitatus. For the body of the county.

Pro falso clamore suo. For his false claim.

Pro læsione fidei. For breach of faith.

Pro opere et labore. For work and labor.

Pro re nata. According to the circumstances; for the special occasion.

Pro salute animæ. For the welfare of the soul.

Pro salute animarum. For the welfare of their souls.

Pro tanto. For so much; to that extent.

Pro tempore. For the time being; temporarily.

Probus et legalis homo. A good and lawful man.

Procedendo. For proceeding [to judgment].

Procedendo ad judicium. For proceeding to judgment.

Prochein amy. Next friend.

Procul dubio quod alterum libertas, alterum necessitas impelleret. Because, doubtless, his own free will impelled the one, while necessity impelled the other.

Proditorie et contra ligeantiæ suæ debitum. Treasonably and against the duty of his allegiance.

Progressum est ut ad filios deveniret, in quem scilicet dominus hoc vellet beneficium confirmare. It came to pass that it went to the sons, to whichever one, that is, to whom the lord wished to confirm this fief.

Prope soli barbarorum singulis uxoribus contenti sunt. Almost alone of the barbarians are content, each with one wife.

Propria manu. With his own hand.

Propter affectum. On account of bias, (or partiality).

Propter defectum. On account of defect.

Propter defectum sanguinis. On account of failure of blood.

Propter defectum sexus. For defect of sex.

Propter delictum. On account of crime.

Propter delictum tenentis. On account of the crime of the tenant.

Propter honoris respectum. For respect of rank.

Propter impotentiam. On account of inability.

Propter odium delicti. On account of the odium of the crime.

Propter privilegium. By reason of privilege.

Publici juris. Of public right.

Puis darreign continuance. Since the last continuance.

Pur auter vie. For another's life.

Quæ de minimis non curat. Which does not care for trifles.

Quæ ipso usu consumuntur. Which are consumed by the use itself.

Quæ relicta sunt et tradita. Which are left and handed down.

Quædam præstatio loco relevii in recognitionem domini. A certain payment, instead of a relief, in acknowledgment of the lord.

Quantum. How much; the amount.

Quantum meruit. As much as he has deserved.

Quantum valebant. As much as they were worth.

Quare clausum querentis fregit. Wherefore he broke the close of the complainant.

Quare ejecit infra terminum. Wherefore he ejected him during the term.

Quare vi et armis clausum ipsius A. apud B. fregit, et blada ipsius A. ad valentiam centum solidorum ibidem nuper crescentia cum quibusdam averiis depastus fuit, conculcavit, et consumpsit, etc. Wherefore by force and arms he broke the close of the said A. at B., and with certain cattle depastured, trampled down, and consumed the crops of the said A., to the value of one hundred shillings, there lately growing, etc.

Quarto die post. On the fourth day afterwards.

Quasi agnum committere lupo, ad devorandum. Like committing a lamb to a wolf to be devoured.

Quatenus. As.

Querela inofficiosi testamenti. Complaint of an inofficious will, (i.e. one contrary to natural duty). (See page 161.)

Qui alienum fundum ingreditur, potest a domino, si is præviderit, prohiberi ne ingreditur. He who enters the ground of another may be forbidden to enter by the owner, if he has foreseen it.

Qui cadere possit in virum constantem, non timidum et meticulosum. Which may happen to a man that is resolute, not timid and fearful.

Qui cum aliter tueri se non possunt, damni culpam dederint, innoxii sunt. If those who are not otherwise able to protect themselves, have inflicted injury, they are blameless.

Qui ex damnato coitu nascuntur, inter liberos non computantur. Those who are born of illicit intercourse are not reckoned among the children.

Qui facit per alium, facit per se. He who does a thing by another, does it by himself.

Qui tam pro domino rege, etc., quam pro se ipso in hac parte sequitur. Who sues, in this behalf, as well for the king, etc., as for himself.

Qui vi rapuit, fur improbius esse videtur. He who has taken by force, seems to be the more wicked thief.

Quia emptores. Because purchasers.

Quia interest reipublicæ ut sit finis litium. Because it is to the advantage of the state that there should be a limit to litigation.

Quia non sua culpa, sed parentum, id commisisse cognoscitur. Because she is deemed to have committed it, not through her own fault, but that of her parents.

Quid pro quo. Something for something.

Quiddam honorarium. A recompense from gratitude.

Quinto exactus. Required the fifth time.

Quo minus sufficiens existit. By which he is less able.

Quo warranto. By what warrant.

Quoad hoc. As far as this; to this extent; in this respect.

Quod ab ædibus non facile revellitur. What is not easily severed from a house.

Quod computet. That he account.

Quod libera sit cujuscunque ultima voluntas. That the last will of everyone may be free.

Quod naturalis ratio inter omnes homines constituit, vocatur jus gentium. What natural reason has established among all men is called the law of nations.

Quod nocumentum amoveatur. That the nuisance may be removed.

Quod nullius est, id ratione naturali occupanti conceditur. That which belongs to no one is by natural reason conceded to him who takes possession of it.

Quod ordinarii, hujusmodi bona nomine ecclesiæ occupantes nullam vel saltem indebitam faciunt distributionem. Because the ordinaries, taking possession of goods of this kind in the name of the church, make no distribution, or at least no due distribution.

Quod partes replacent. That the parties replead.

Quod permittat prosternere. That he permit [the plaintiff] to abate.

Quod pœnam imprisonmenti subire non potest. That he cannot undergo the punishment of imprisonment.

Quod populus postremum jussit, id jus ratum esto. Let that which the people have last decreed be deemed the law.

Quod principi placuit legis habet vigorem, cum populus ei et in eum omne suum imperium et potestatem conferat. What the emperor has willed has the force of law, since the people transfer to him and upon him all their supremacy and power.

Quod talem eligi faciat, qui melius et sciat, et velit et possit, officio illi intendere. That he cause such a one to be chosen as will best have the knowledge, will, and capacity, to administer that office.

Quorum aliquem vestrum, A, B, C, D, etc., unum esse volumus. Of whom we wish some one of you, A, B, C, D, etc., to be one.

Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est. Whenever there is no ambiguity in the words, then no exposition should be made contrary to the words.

Raptus mulierum. Rape of women.

Ratione impotentiae. By reason of inability.

Ratione soli. By reason of the soil.

Replegiari facias. Cause to be replevied.

Respondeat ouster. That he answer over.

Respondentia. From *respondere*, to answer, (since the borrower is bound to answer personally).

Responsa prudentum. Opinions of jurists.

Restitutor. The restorer.

Retraxit. He has withdrawn.

Revertendi animum videntur desinere habere tunc, cum revertendi consuetudinem deseruerint. They are then deemed to cease to have the disposition to return when they have lost the habit of returning.

Sacerdotes a regibus honorandi sunt, non judicandi. Priests are to be honored, not judged, by kings.

Sacrilegii instar est rescripto principis obviari. It is like sacrilege to oppose the rescript of the emperor.

Salvo pudore. Without violation of decency.

Sanctio justa, jubens honesta, et prohibens contraria. A just decree, commanding what is right and forbidding the contrary.

Scandalum magnatum. Slander of great men.

Scire facias. Cause [A] to know; (*i.e.* Give notice to A).

Scribere est agere. To write is to act.

Se defendendo. In defending one's self; in self-defense.

Secundum æquum et bonum. According to justice and right.

Seisina facit stipitem. Seizin makes the stock, (*i.e.* the source of descent).

Senatus consulta. General laws of the senate.

Senatus decreta. Special decrees of the senate.

Servato juris ordine. The requirement of the law being observed.

Servi nascuntur. They are born slaves.

Servientes ad legem. Serjeants at law; (*i.e.* persons serving in the law).

Servitia servientium et stipendia famulorum. The services of servants and the stipends of attendants.

Servus facit, ut herus det; herus dat, ut servus faciat. The servant works, that the master may give; the master gives, that the servant may work.

Sextus Decretalium. The sixth of the decretals.

Si equam meam equus tuus prægnantem fecerit, non est tuum sed meum quod natus est. If your horse has made my mare pregnant, the offspring is not yours but mine.

Si non omnes. If not all [can be present, etc.].

Si non sequatur ipsius vadii traditio, curia domini regis hujusmodi privatas conventiones tueri non solet. If delivery of the pledge itself does not follow, the king's court is not accustomed to uphold private agreements of this kind.

Si plura sint debita, vel plus legatum fuerit, ad quæ catalla defuncti non sufficient, fiat ubique defalcatio, excepto regis privilegio. If more debts are due, or more has been bequeathed, for which the chattels of the deceased are not sufficient, let there be made everywhere a deduction, excepting the privilege of the lord the king.

Si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli debent. If anything is owed to the corporation, it is not owed to the members; nor do the members owe what the corporation owes.

Si universitas ad unum redit, et stet nomen universitatis. If a corporation is reduced to one, the name of corporation may still continue.

Si uxor possit dotem promereri, et virum sustinere. If the wife can earn her dower and support her husband.

Si vasallus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur. If the vassal has wasted the fief, or has impaired its value by special injury, he shall be deprived of it.

Sic utere tuo ut alienum non lædas. So use your own as not to injure another's.

Simplex obligatio. A simple obligation; a single bond.

Sive quis incuria, sive morte repentina, fuerit intestatus mortuus, dominus tamen nullam rerum suarum (partem præter eam quæ jure debetur hereoti nomine) sibi assumito. Verum possessiones uxori, liberis, et cognatione proximis, pro suo cuique jure, distribuantur. If any one has died intestate, whether by his neglect or by sudden death, yet let not the lord take to himself any part of his property (except that which is justly due to him by the name of heriot). But let his possessions be distributed to his wife, children, and next of kin, to each one according to his right.

Sive sit masculus sive fœmina. Whether [the heir] be male or female.

Solvendum in futuro. To be paid in the future.

Solvit ad diem. He paid on the day.

Son assault demesne. His own assault.

Sparsim. Scatteredly; here and there.

Sponsio judicialis. A judicial wager. (In Roman law, this was an agreement between the parties to a lawsuit that the one who lost the suit would pay a certain sum to the winner.)

Stabitur præsumptioni donec probetur in contrarium. A presumption will be upheld until the contrary is proved.

Statuimus, ut omnes liberi homines fœdere et sacramento affirmant, quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere. We decree that all free men affirm by covenant and by oath that within and without the whole realm of England they will be faithful to William the king, their lord; and will with him everywhere protect his lands and honors with all fidelity, and defend him against enemies and aliens.

στοργή. Love; affection.

Stricti juris. Of strict right; of strict construction in law.

Sub modo. Under a qualification; in a qualified way.

Subpœna ad testificandum. A subpœna to testify.

Successionis feudi talis est natura, quod ascendentes non succedunt. The nature of the succession of a feud is such that ancestors do not take by succession.

Summa providentia. The greatest forethought.

Super visum corporis. Upon view of the body.

Supersedeas. That you supersede.

Suum cuique incommodum ferendum est, potius quam de alterius commodis

detrahendum. Every one must bear his own disadvantage rather than take from the advantages of another.

Syngrapha. Deeds written together. (From σύν together, and γράφω, to write.)

Tacito et illiterato hominum consensu et moribus expressum. Expressed by the tacit and unwritten consent and customs of men.

Tales de circumstantibus. Such men from the bystanders.

Tam immensus aliarum super alias acervatarum legum cumulus. So immense a heap of laws piled one above another.

Tanquam testamentum inofficiosum. As an inofficious testament. (See page 161.)

Tenendum per servitium militare, in burgagio, in libero socagio, etc. To be held by knight service, in burgage, in free socage, etc.

Tenor est qui legem dat feudo. It is the tenor which gives law to the fief; (i.e. the language limiting the feudal grant governs its effect and extent in law).

Terminus a quo. The limit from which; the starting-point.

Terræ dominicales. Lands of the lord; demesne lands.

Terre-tenant. Tenant of the land.

Tertia. A third part.

Testamenti executores esse debent ii, quos testator ad hoc elegerit, et quibus curam ipse commiserit; si vero testator nullos ad hoc nominaverit, possunt propinqui et consanguinei ipsius defuncti ad id faciendum se ingerere. The executors of a will ought to be those whom the testator has selected for this purpose and to whom he has himself committed the charge; but if the testator has named none for this trust, the kinsmen and blood-relatives of the deceased may undertake its discharge.

Testatio mentis. A testifying of the intention.

Testatum est. It is witnessed.

Teste comitatu, hundredo, etc. Witness the county, hundred, etc.

Teste meipso. Witness myself.

Titulus est justa causa possidendi id quod nostrum est. Title is the rightful ground of possessing that which is ours.

Traditio nihil aliud est quam rei corporalis de persona in personam, de manu in manum, translatio aut in possessionem inductio: sed res incorporales, quæ sunt ipsum jus rei vel corpori inherens, traditionem non patiuntur. Livery is nothing else than the transfer from person to person, from hand to hand, of a corporeal thing, or the induction into its possession; but incorporeal things, which are the right itself inherent in a thing or in a body, do not admit of livery.

Trans Tiberim. Across the Tiber.

Tres faciunt collegium. Three make a corporation.

Triens. A third part.

Trina admonitio. A triple admonition.

Trinoda necessitas. The threefold necessity, (or obligation).

Ubi nullum matrimonium, ibi nulla dos. Where there is no marriage, there is no dower.

Ubique fuerimus in Anglia. Wherever we may be in England.

Ultimum supplicium. The extremest punishment, (*i.e.* death).

Ultimus hæres. The last heir.

Un disposition a faire un male chose. A disposition to do an evil deed.

Usura maritima. Maritime interest.

Ut feudum antiquum. As an ancient feud.

Ut feudum paternum. As a paternal feud.

Ut feudum stricte novum. As a feud strictly new.

Ut liberum tenementum. As a freehold.

Ut martius populus aliquid sibi terræ daret, quasi stipendium; cæterum, ut vellet, manibus atque armis suis uteretur. That the warlike people (*i.e.* the Roman people) should give to them some land as a stipend, and in return make use of their lands and their weapons, as they (*i.e.* the Romans) wished.

Ut pœna ad paucos, metus ad omnes, perveniat. That punishment may come to few, fear to all.

Ut res magis valeat, quam pereat. That the matter may rather avail, than perish.

Valor maritagii; valorem maritagii. Value of the marriage.

Venditio per mutuam manuum complexionem. Sale by the mutual claspings of hands.

Venire; venire facias. That you cause to come.

Verba fortius accipiuntur contra proferentem. Words are to be taken most strongly against the one using them.

Verba intentioni debent inservire. Words ought to subserve the intention.

Veritatem dicere. To speak the truth.

Vi et armis. By force and arms.

Victus victori in expensis condemnandus est. The loser must be adjudged to pay the expenses to the winner.

Viginti annorum lucubrationes. The lucubrations of twenty years.

Vilis. Of little value; cheap; mean; base.

Villana faciunt servitia, sed certa et determinata. They perform villein services, but certain and determinate.

Vinculum personarum ab eodem stipite descendendum. The connection of persons descending from the same stock.

Vindices injuriarum. The avengers of injuries.

Virtute officii. By virtue of his office.

Viva voce. By the living voice; by word of mouth.

Voir dire. To speak the truth.

Voluntarius dæmon. A voluntary madman.

Voluntas regis in curia, non in camera. The will of the king in his court, not in his chamber.

III.

A Table of English Regnal Years.

The following table will be serviceable to the student in ascertaining when the various English statutes, cited in the text, were enacted.

SOVEREIGNS.	COMMENCEMENT OF REIGN.	LENGTH OF REIGN.
William I.	October 14, 1066.	21
William II.	September 26, 1087.	13
Henry I.	August 5, 1100.	36
Stephen.	December 26, 1135.	19
Henry II.	December 19, 1154.	35
Richard I.	September 3, 1189.	10
John.	May 27, 1199.	18
Henry III.	October 28, 1216.	57
Edward I.	November 16, 1272.	35
Edward II.	July 8, 1307.	20
Edward III.	January 25, 1327.	51
Richard II.	June 22, 1377.	23
Henry IV.	September 30, 1399.	14
Henry V.	March 21, 1413.	10
Henry VI.	September 1, 1422.	39
Edward IV.	March 4, 1461.	23
Edward V.	April 9, 1483.
Richard III.	June 26, 1483.	3
Henry VII.	August 22, 1485.	24
Henry VIII.	April 22, 1509.	38
Edward VI.	January 28, 1547.	7
Mary.	July 6, 1553.	6
Elizabeth.	November 17, 1558.	45
James I.	March 24, 1603.	23
Charles I.	March 27, 1625.	24
The Commonwealth.	January 30, 1649.	11
Charles II.*.	May 29, 1660.	37
James II.	February 6, 1685.	4
William and Mary.	February 13, 1689.	14
Anne.	March 8, 1702.	13
George I.	August 1, 1714.	13
George II.	June 11, 1727.	34
George III.	October 25, 1760.	60
George IV.	January 29, 1820.	11
William IV.	June 26, 1830.	7
Victoria.	June 20, 1837.

* Although Charles II. did not ascend the throne until 1660, 29th May, his regnal years were computed from the death of Charles I., January 30, 1649, so that the year of his restoration is styled the twelfth of his reign.

IV.

Abbreviations used in citing English, American, etc., Reports.

Well-known abbreviations, such as those of the States in this country, are omitted. In this table, *Dist.* denotes District; *Eng.*, England; *Ch.*, Chancery; *H. L.*, House of Lords; *C. P.*, Common Pleas; *K. B.* or *Q. B.*, King's or Queen's Bench; *Exch.*, Exchequer; *N. P.*, *Nisi Prius*.

Only the usual abbreviations are given in this table; but various others are in use, so that the student may need to examine all the titles under a particular letter before finding the name of the Report for which he is seeking. — See also Supplementary List at the end of this Table.

A. and E., or Ad.

and El......Adolphus and Ellis's Reports, *Q. B. Eng.*

A. and E. N. S......Adolphus and Ellis's Reports, New Series, commonly quoted as Queen's Bench Reports.

A. and H......Arnold and Hodge's Reports, *K. B. Eng.*

Abb. Adm......Abbott's Admiralty Reports, Southern Dist. of *N. Y.*

Abb. Dec......Abbott's Decisions (Ct. of Appeals, *N. Y.*).

Abb. N. C......Abbott's New Cases, *N. Y.*

Abb. Pr......Abbott's Practice Reports, *N. Y.*

Abb. Pr. N. S......Abbott's Practice Reports, New Series, *N. Y.*

Abb. U. S......Abbott's Reports of Cases in *U. S. Circuit and Dist. Cts.*

Abr. Cas. Eq......Equity Cases Abridged, *Eng.*

Act. or Acton......Acton's Privy Council Reports, *Eng.*

Add. Eccl......Addam's Ecclesiastical Reports, *Eng.*

Add. Penn......Addison's Reports, *Pa.*

Adm. and Ecc......English Law Reports, Admiralty and Ecclesiastical.

Aik......Aiken's Reports, *Vt.*

A. K. Marsh......A. K. Marshall's Reports, *Ky.*

Al. and N......Alcock and Napier's Reports, *K. B. Ireland.*

Alb. L. J......Albany Law Journal, *N. Y.*

Aleyn.....Aleyn's Select Cases, *K. B. Eng.*

All. or Allen......Allen's Reports (83-96 *Mass.*).

Allen, N. B......Allen's New Brunswick Reports.

Amb......Ambler's Reports, Chancery, *Eng.*

Am. Dec......American Decisions.

Am. Rep......American Reports.

Ames......Ames' Reports (4-7 *R. I.*).

And......Anderson's Reports, *C. P. Eng.*

Andr......Andrew's Reports, *K. B. Eng.*

Ang......Angell's Reports (1 *R. I.*).

Anst......Anstruther's Reports, *Exch. Eng.*

Anth. N. P......Anthon's *Nisi Prius* Cases, *N. Y.*

App. Cas......Appeal Cases, English Law Reports.

Appleton......Appleton's Reports (19, 20 *Me.*).

Arkley.....Arkley's Justiciary Reports, *Scotch.*

- Arms. M. and O.** Armstrong, Macartney and Ogle's Reports, N. P. Ireland
Arn Arnold's Reports, C. P. Eng.
Arn. and Hod. Arnold and Hodge's Reports, Q. B. Eng.
Ashm Ashmead's Reports, Pa.
Atk Atkyn's Reports, Chancery, Eng.
B. and Ad Barnewell and Adolphus's Reports, K. B. Eng.
B. and A., or B. and
 Ald. Barnewell and Alderson's Reports, K. B. Eng.
B. and B. Broderip and Bingham's Reports, C. P. Eng.
B. and C., or Barn.
 and Cr. Barnewell and Creswell's Reports, K. B. Eng.
B. and P., or Bos.
 and P. Bosanquet and Puller's Reports, C. P. Eng.
B. and P., N. R. Bosanquet and Puller's New Reports, C. P. Eng.
B. and S. Best and Smith's Reports, Q. B. Eng.
B. Mon Ben Monroe's Reports, Ky.
Bailey Bailey's Reports, S. C.
Bailey Eq Bailey's Equity Reports, S. C.
Bald. Baldwin's Reports, 3d Circuit, U. S.
Ball and B. Ball and Beatty's Reports, Irish Chancery.
Bann. and Ard. Banning and Arden's Patent Cases, U. S.
Barber Barber's Reports (14-24 Ark.).
Barb Barbour's Reports, Supreme Ct., N. Y.
Barb. Ch Barbour's Chancery Reports, N. Y.
Barn. Barnardiston's Reports, K. B. Eng.
Barn. Ch. Barnardiston's Chancery Reports, Eng.
Barnes Barnes' Notes, C. P. Eng.
Barr. Barr's Reports (1-10 Pa. St.).
Batt Batty's Reports, Ireland.
Baxt. Baxter's Reports, Tenn.
Bay Bay's Reports, S. C.
Beas. Beasley's Chancery Reports (12 and 13 N. J. Eq.).
Beatt. Beatty's Reports, Irish Chancery.
Beav. Beavan's Chancery Reports, Eng.
Bee. Bee's Reports, U. S. (Dist. of S. C.).
Bell Ap. Cas. Bell's Appeal Cases, House of Lords.
Bell C. C. Bell's Crown Cases Reserved, Eng.
Bel. or Bellewe Bellewe's Cases *temp.* Rich. II., Eng.
Ben. Benedict's Reports, U. S. (Dist. of N. Y.).
Benl. Benloe's Reports, K. B. Eng.
Benl. C. P. Benloe's Reports, C. P. Eng.
Best and S. Best and Smith's Reports, Q. B. Eng.
Bibb. Bibb's Reports, Ky.
Bing. Bingham's Reports, C. P. Eng.
Bing. N. C. Bingham's New Cases, C. P. Eng.
Binn. Binney's Reports, Pa.
Bliss. Bissell's Reports, 7th Circuit, U. S.
Bl. and H. Blatchford and Howland's Reports, U. S. (Dist. of N. Y.).

- Bl. R** Blackstone's (Wm.) Reports, K. B. Eng.
Black Black's Reports, Supreme Court, U. S.
Blackf Blackford's Reports, Ind.
Bland Ch Bland's Chancery Reports, Md.
Blatchf Blatchford's Reports, 2d Circuit, U. S.
Blatchf. Pr. Cas. Blatchford's Prize Cases, U. S. (Dist. of N. Y.).
Bli. or Bligh Bligh's Reports, House of Lords, Eng.
Bli. N. S Bligh's Reports, New Series, House of Lords, Eng.
Bond Bond's Reports, 6th Circuit, U. S.
Bosw Bosworth's Reports, Superior Court, N. Y.
Br. and Lush Browning and Lushington's Admiralty Reports, Eng.
Bradf. Bradford's Surrogate Reports, N. Y.
Bradf. (Ia.) Bradford's Reports, Iowa (reprinted in 2d ed. of Morris).
Bradw Bradwell's Appellate Reports, Ill.
Brayt Brayton's Reports, Vt.
Breese Breese's Reports, Ill.
Brev Brevard's Reports, S. C.
Brewst Brewster's Reports, Pa.
Bridg. Bridgman's Reports, C. P. Eng.
Bridg. O O. Bridgman's Reports, C. P. Eng.
Bright Brightly's Reports, Pa.
Bro. Abr. Brooke's Abridgment, Eng.
Bro. Adm Brown's Admiralty Reports, U. S. Dist. Courts.
Brock Brockenbrough's Reports, 4th Circuit, U. S.
Bro. N. C. Brook's New Cases, K. B. Eng.
Bro. or Br. C. C. Brown's Chancery Cases, Eng.
Bro. P. C Brown's Parliamentary Cases, Eng.
Bro. and B. Broderip and Bingham's Reports, C. P. Eng.
Brown, N. P Brown's Nisi Prius Reports, Mich.
Browne Browne's Reports, Pa.
Brownl. Brownlow's Reports, Eng.
Brownl. and G. Brownlow and Goldsborough's Reports, C. P. Eng.
Buck Buck's Bankruptcy Cases, Eng.
Buff. Spr. Ct Buffalo Superior Court Reports, N. Y.
Bul. N. P., or B. N.
 P. Buller's Nisi Prius, Eng.
Bulst. Bulstrode's Reports, K. B. Eng.
Bunb. Bunbury's Reports, Exch. Eng.
Burnett Burnett's Reports, Wis. (reprinted in 1 Pinney).
Burr Burrow's Reports, K. B. Eng.
Busb Busbee's Law Reports, N. C.
Busb. Eq. Busbee's Equity Reports, N. C.
Bush Bush's Reports, Ky.
C. B. Common Bench Reports, Eng. (the first eight by Manning, Granger, and Scott; the ninth, by Manning and Scott; the rest, viz., the tenth to eighteenth, by Scott).
C. B. N. S. Common Bench Reports, New Series, Eng.
C. and K. Carrington and Kirwan's Reports, N. P. Eng.

- C. and M.**.....Carrington and Marshman's Reports, N. P. Eng. (See
Cromp. and M.)
C. and P......Carrington and Payne's Reports, N. P. Eng.
C. E. Gr......C. E. Green's Reports (16-27 N. J. Eq.).
C. H. Rec......City Hall Recorder Reports, N. Y. City.
C. M. and R......(See Cromp. M. and R.)
C. P. D......Common Pleas Division, English Law Reports.
C. Rob. Adm......C. Robinson's Admiralty Reports, Eng.
Cai. or Caine's.....Caine's Reports, N. Y.
Cai. Cas......Caine's Cases in Error, N. Y.
Call.....Call's Reports, Va.
Calth......Calthrop's Reports, K. B. Eng.
Cam. and Nor......Cameron and Norwood's Reports, N. C.
Campb......Campbell's Reports, N. P. Eng.
Car. and K......(See C. and K.)
Car. and M......(See C. and M.)
Car. and P......(See C. and P.)
Car. or Cart.....Carter's Reports, Ind.
Cart......Carter's Reports, C. P. Eng.
Carth......Carthew's Reports, K. B. Eng.
Cary.....Cary's Reports, Chancery, Eng.
Cas. Ch......Cases in Chancery, Eng.
Cas. Temp. Hardw.Cases *tempore* Hardwick, Chancery, Eng.
Cas. Temp. Talb....Cases *tempore* Talbot, Chancery, Eng.
Cas. Temp. Sugd....Cases *tempore* Sugden, Chancery, Ireland.
Casey.....Casey's Reports (25-36 Pa. State).
Ch. Div......Chancery Division, English Law Reports.
Ch. Rep......Reports in Chancery, Eng.
Chase.....Chase's Decisions, 4th Circuit, U. S.
Chand. Wis......Chandler's Wisconsin Reports (reprinted in 2 and 3 Pinney).
Charlt......T. U. P. Charlton's Reports, Ga.
Charlt. R. M......R. M. Charlton's Reports, Ga.
Chev......Cheves's Reports, S. C.
Chev. Eq.....Cheves's Equity Cases, S. C.
Chip. D......D. Chipman's Reports, Vt.
Chip. N......N. Chipman's Reports, Vt.
Chit. R......Chitty's Reports (Bail Ct., Eng.).
Cin. S. C. Rep......Cincinnati Supreme Ct. Reports.
City Ct. Rep......City Court Reports, N. Y. City.
Cl. and Fin......Clark and Finnelly, House of Lords Reports, Eng.
Clarke.....Clarke's Chancery Reports, N. Y.
Clarke (Ia.).....Clarke's Reports (1-8 Ia.).
Clif......Clifford's Reports, 1st Circuit, U. S.
Co......Coke's Reports, K. B. Eng.
Cobb.....Cobb's Reports, Ga.
Code Rep......Code Reporter, N. Y.
Col. Cas......Coleman's Cases, N. Y.
Col. and C......Coleman and Caines's Cases, N. Y.

- Cold**.....Coldwell's Reports, Tenn.
Coll. or Coll. C. C...Collyer's Reports, Chancery, Eng.
Colles.....Colles's Cases in Parliament, Eng.
Com. or Comyn....Comyn's Reports, K. B. Eng.
Comb.....Comberbach's Reports, K. B. Eng.
Comst.....Comstock's Reports (1-4 N. Y.).
Con. and L......Connor and Lawson's Reports, Irish Chancery.
Const. Rep......Reports of Constitutional Court, S. C.
Cooke, C. P......Cooke's Reports, C. P. Eng.
Cooke, Tenn......Cooke's Tennessee Reports.
Cooke and Al.....Cooke and Alcock's Reports, K. B. Ireland.
Coop. Ch......Cooper's Reports, Chancery, Tenn.
Coop. Pr. Cas.....Cooper's Practice Cases, Eng.
Coop.Temp.Brough..Cooper's Reports *tempore* Brougham, Chancery, Eng.
Coop. Temp. Cott...Cooper's Reports *tempore* Cottenham, Chancery, Eng.
Cow.....Cowen's Reports, N. Y. (Supreme Ct. and Ct. of Errors).
Cowp.....Cowper's Reports, K. B. Eng.
Cox, Ch......Cox's Reports, Chancery, Eng.
Cox, C. C......Cox's Crown Cases, Eng.
Coxe.....Coxe's Reports (1 N. J. Law).
Crabbe.....Crabbe's Reports, U. S., East Dist. Pa.
Cr. and Phil......Craig and Phillips' Reports, Chancery, Eng.
Cr. and St......Craigie and Stewart's Reports, House of Lords (Scotch).
Cr. or Cranch....Cranch's Reports, Supreme Court, U. S.
Cr. C. C., or Cranch
 C. C......Cranch's Circuit Court Reports, U. S. (District Columbia).
Critchf......Critchfield's Reports (5-21 O. St.).
Cro. Car......Croke's Reports, time of Charles I., K. B. Eng.
Cro. Eliz......Croke's Reports, time of Elizabeth, Q. B. Eng.
Cro. Jac......Croke's Reports, time of James I., K. B. Eng.
Crompt. and J., or C.
 and J......Crompton and Jarvis's Reports, Exch. Eng.
Crompt. and M., or C.
 and M......Crompton and Meeson's Reports, Exch. Eng.
Crompt. M. and R.,
 or C. M. and R...Crompton, Meeson and Roscoe's Reports, Exch. Eng.
Ct. Cl......Court of Claims Reports, U. S.
Cun......Cunningham's Reports, K. B. Eng.
Curt. C. C......Curtis's Reports, 1st Circuit, U. S.
Curt. Ecc......Curteis's Ecclesiastical Reports, Eng.
Cush.....Cushing's Reports (55-66 Mass.).
Cushm.....Cushman's Reports (23-29 Miss.).
D. Chip.....D. Chipman's Reports, Vt.
Dal......Dalison's Reports, C. P. Eng.
Dall.....Dallas's Reports, Supreme Court, U. S. (also contains Pa. Cases).
Dall., Tex......Dallam's Reports, Tex.
Daly.....Daly's Reports, Common Pleas, N. Y.

- Dan. Ex.**.....Daniell's Reports, Exch. Eng.
Dana.....Dana's Reports, Ky.
Davies.....Davies's Reports, U. S. Dist. Courts.
Dav. and Mer.....Davison and Merivale's Reports, Q. B. Eng.
Day.....Day's Reports, Conn.
Dea. and Sw.....Deane and Swabey's Reports, Probate and Divorce, Eng.
Deac.....Deacon's Bankruptcy Reports, Eng.
Deac. and C......Deacon and Chitty's Bankruptcy Reports, Eng.
Deady.....Deady's Reports, 9th Circuit, U. S.
Deane.....Deane's Ecclesiastical Reports, Eng.
Dears.....Dearsley's Crown Cases Reserved, Eng.
Dears. and B......Dearsley and Bell's Crown Cases Reserved, Eng.
De G. Bank.....De Gex's Bankruptcy Cases, Eng.
De G. F. and J......De Gex, Fisher and Jones's Chancery Reports, Eng.
De G. and J......De Gex and Jones's Chancery Reports, Eng.
De G. J. and S......De Gex, Jones and Smith's Chancery Reports, Eng.
De G. J. and S.
Bank.....De Gex, Jones and Smith's Bankruptcy Cases, Eng.
De G. M. and G......De Gex, Macnaghten and Gordon's Chancery Rep's, Eng.
De G. M. and G.
Bank.....De Gex, Macnaghten and Gordon's Bankruptcy Cases.
De G. and Sm......De Gex and Smale's Chancery Reports, Eng.
Den. or Denio.....Denio's Reports, N. Y. (Supreme Ct. and Ct. of Errors).
Den. C. C......Denison's Crown Cases, Eng.
Des. or Desaus......Desaussure's Equity Reports, S. C.
Dev.....Devereux's Law Reports, N. C.
Dev. Ct. Cl......Devereux's Reports (U. S. Court of Claims).
Dev. Eq......Devereux's Equity Reports, N. C.
Dev. and Bat......Devereux and Battle's Reports, N. C.
Dev. and Bat. Eq......Devereux and Battle's Equity Reports, N. C.
Dick.....Dickens's Reports, Chancery, Eng.
Dill.....Dillon's Reports, 8th Circuit, U. S.
Disney.....Disney's Reports, Ohio.
Dods.....Dodson's Admiralty Reports, Eng.
Dom. Proc......*Domus Procerum*, Cases in the House of Lords, Eng.
Donn.....Donnelly's Reports, Chancery, Eng.
Doug.....Douglas's Reports, K. B. Eng.
Doug. Mich......Douglass's Michigan Reports.
Dow, or Dow P. C......Dow's Reports in Parliament, Eng.
Dow and C......Dow and Clark, House of Lords Cases, Eng.
Dow. and Ry., or D.
and R......Dowling and Ryland's Reports, K. B. Eng.
Dow. and Ry. N. P......Dowling and Ryland's Nisi Prius Reports, Eng.
Dowl. P. C......Dowling's Practice Cases, Eng.
Dowl. N. S......Dowling's Practice Cases, New Series, Eng.
Dr. and Wal......Drury and Walsh's Chancery Reports, Ireland.
Dr. and War......Drury and Warren' Chancery Reports, Ireland.
Drew.....Drewry's Chancery Reports, Eng.

- Drew. and Sm.**.....Drewry and Smale's Reports, Chancery, Eng.
DrinkDrinkwater's Reports, C. P. Eng.
DruryDrury's Reports, Chancery, Ireland.
Dudley.Dudley's Reports, Ga.
Dudley, S. C......Dudley's Reports, S. C.
Dudley Eq.Dudley's Equity Reports, S. C.
DuerDuer's Reports, Superior Court, N. Y.
Durf.Durfee's Reports, R. I.
Durn. and East.....Same as "Term Reports."
Dutch.Dutcher's Reports (25-29 N. J. Law).
Duv.Duvall's Reports, Ky.
Dy. or DyerDyer's Reports, K. B. Eng.
E. D. Sm......E. D. Smith's Reports, Common Pleas, N. Y.
E. L. R......See L. R., A. and E., etc.
East.East's Reports, K. B. Eng.
EdenEden's Reports, Chancery, England.
Edm. Sel. Cas.....Edmond's Select Cases, N. Y.
Edw. Adm......Edwards's Admiralty Reports, Eng.
Edw. Ch.Edwards's Chancery Reports, N. Y.
El. and Bl.Ellis and Blackburn's Reports, Q. B. Eng.
El. B. and E......Ellis, Blackburn and Ellis's Reports, Q. B. Eng.
El. and El.Ellis and Ellis's Reports, Q. B. Eng.
Eng.English's Reports (6-13 Ark.).
Eng. L. and E.....English Law and Equity Reports.
E. P. Smith......E. P. Smith's Reports (15-27 N. Y.).
Eq. Ca. Abr......Equity Cases Abridged, Eng.
Esp. or Esp. N. P...Espinasse's Reports, N. P. Eng.
Exch.Exchequer Reports, Eng. (by Welsby, Hurlstone and Gordon).
Ex. D.Exchequer Division, English Law Reports.
F. and F.Foster and Finlason's Reports, N. P. Eng.
F. N. B.Fitzherbert's Natura Brevium.
FairfFairfield's Reports (10-12 Me.).
Fed. RepFederal Reporter (U. S. Circuit and District Courts).
FergFerguson's Reports, Scotch.
Finch Ch.Finch's Chancery Reports, Eng.
Finch, or Finch L...Finch's Law.
Fish. Pat. CasFisher's Patent Cases, U. S.
Fish. Pat. RepFisher's Patent Reports, U. S.
Fish. Pr. Cas.....Fisher's Prize Cases, U. S. (Dist. of Pa.).
Fitzg.Fitzgibbon's Reports, K. B. Eng.
Flip.Flippin's Reports, 6th Circuit, U. S.
FoggFogg's Reports (32-37 N. H.).
For.Forrest's Reports, Exchequer, Eng.
Fort. de Laud.....Fortescue de Laudibus Angliæ Legum.
Fort. or Fortes.....Fortescue's Reports, K. B. Eng.
FostFoster's Reports (21-31 N. H.).
Fost. and F......Foster and Finlason's Reports, N. P. Eng.

- Free. Ch.**.....Freeman's Chancery Reports, Eng.
Freem......Freeman's Reports, K. B. Eng.
Freem. (Ill.).....Freeman's Reports (31-103 Ill.).
Freem. Miss......Freeman's Reports, Chancery, Miss.
G. and J......Gill and Johnson's Reports, Md.
G. and J......Glyn and Jameson's Bankruptcy Reports, Eng.
Ga. Dec......Georgia Decisions.
Gale......Gale's Reports, Exchequer, Eng.
Gale and Dav......Gale and Davison's Reports, K. B. Eng.
Gall. or Gallis......Gallison's Reports, 1st Circuit, U. S.
George......George's Reports (30-39 Miss.).
Gif......Giffard's Reports, Chancery, Eng.
Gilb. Cas......Gilbert's Cases in Law and Equity, Eng.
Gilb. Ch......Gilbert's Chancery Reports, Eng.
Gill......Gill's Reports, Md.
Gill and J......Gill and Johnson's Reports, Md.
Gilm......Gilman's Reports (6-10 Ill.).
Gilmer......Gilmer's Reports, Va.
Gilpin......Gilpin's Reports, Dist. of Pa., U. S.
Godb......Godbolt's Reports, K. B. Eng.
Golds......Goldesborough's Reports, K. B. Eng.
Gow N. P......Gow's Nisi Prius Cases, Eng.
Grant......Grant's Reports, Pa.
Grat......Grattan's Reports, Va.
Gray......Gray's Reports (67-82 Mass.).
Green, N. J......Green's Reports (13-15 N. J. Law).
Green Ch......Green's Chancery Reports (2-4 N. J. Eq.).
Greene, C. E......C. E. Greene's Reports (16-27 N. J. Eq.).
Greene, Ia......Greene's Reports, Iowa.
Greenl......Greenleaf's Reports (1-9 Me.).
H. Bl......Henry Blackstone's Reports, C. P. Eng.
H. L. Cases......House of Lords Cases, Eng.
H. and C......Hurlstone and Coltman's Reports, Exch. Eng.
H. and G., or Har.
 and G......Harris and Gill's Reports, Md.
H. and H......Horn and Hurlstone's Reports, Exch. Eng.
H. and J., or Har.
 and J......Harris and Johnson's Reports, Md.
H. and McH......Harris and McHenry's Reports, Md.
H. and N......Hurlstone and Norman's Reports, Exch. Eng.
H. and R......Harrison and Rutherford's Reports, C. P. Eng.
H. and Tw......Hall and Twell's Chancery Reports, Eng.
H. and W......Harrison and Wollaston's Reports, K. B. Eng.
H. and W......Hurlstone and Walmsley's Reports, Exch. Eng.
Hag. Adm......Haggard's Admiralty Reports, Eng.
Hag. Con......Haggard's Consistory Reports, Eng.
Hag. Ec. or Hagg......Haggard's Ecclesiastical Reports, Eng.
Hall......Hall's Reports, Superior Court, N. Y.

alst	Halsted's Reports (6-12 N. J. Law).
alst. Ch.....	Halsted's Reports (5-8 N. J. Eq.).
am.....	Hammond's Reports (1-9 Ohio).
and	Hand's Reports (40-45 N. Y.).
andy	Handy's Reports, Ohio.
ardin	Hardin's Reports, Ky.
ardr. or Hard....	Hardres's Reports, Exch. Eng.
are.....	Hare's Reports, Chancery, Eng.
arg. St. Tr.....	Hargrave's State Trials, Eng.
arper.....	Harper's Reports, S. C.
arper's Eq.....	Harper's Equity Reports, S. C.
arr.....	Harrington's Reports, Del.
arr. Ch.....	Harrington's Chancery Reports, Mich.
arr. N. J.....	Harrison's Reports (16-19 N. J. Law).
arris.....	Harris's Reports (13-24 Pa. St.).
awks	Hawks's Reports, N. C.
ayw.....	Haywood's Reports, N. C. and Tenn.
ead	Head's Reports, Tenn.
eisk.....	Heiskell's Reports, Tenn.
em. and M.....	Hemming and Miller, Chancery, Eng.
emp.....	Hempstead's Reports, 8th Circuit, U. S.
en. and Munf....	Hening and Munford's Reports, Va.
et.....	Hetley's Reports, C. P. Eng.
ill.....	Hill's Reports, N. Y. (Supreme Ct. and Ct. of Errors).
ill and D.....	Hill and Denio's Supplement, N. Y.
ill Ch.....	Hill's Chancery Reports, S. C.
ill S. C.....	Hill's South Carolina Reports.
ilt.....	Hilton's Reports, Common Pleas, N. Y.
ob.....	Hobart's Reports, K. B. Eng.
odg.....	Hodge's Reports, C. P. Eng.
off.....	Hoffman's Chancery Reports, N. Y.
olmes	Holmes' Reports, 1st Circuit, U. S.
olt	Holt's Reports, K. B. Eng.
olt Eq.....	Holt's Equity Reports, Eng.
olt N. P.....	Holt's Nisi Prius Reports, Eng.
opk.....	Hopkin's Reports, Chancery, N. Y.
ous.....	Houston's Reports, Del.
ous. Cr.....	Houston's Criminal Reports, Del.
ov. Suppl.....	Hovenden's Supplement to Vesey, Jr.
ow. or How. U. S.	Howard's Reports, Supreme Court, U. S.
ow. Cas.....	Howard's Court of Appeals Cases, N. Y.
ow. Miss.....	Howard's Reports, Miss.
ow Pr.....	Howard's Practice Reports, N. Y.
ow. St. Tr.....	Howell's State Trials, Eng.
ugh. C. C.....	Hughes' Reports, 4th Circuit, U. S.
ughes	Hughes's Reports, Ky.
umph.....	Humphrey's Reports, Tenn.
un.....	Hun's Reports, Supreme Court, N. Y.

- Hut.**.....Hutton's Reports, C. P. Eng.
Ill. App......Illinois Appellate Cases.
Ired......Iredell's Reports, N. C.
Ired. Eq......Iredell's Reports, Equity, N. C.
J. and Sp......Jones and Spencer's Reports, Superior Court, N. Y.
J. J. Marsh......J. J. Marshall's Reports, Ky.
J. and W., or Jac.
 and W......Jacob and Walker's Reports, Chancery, Eng.
Jac. or Jacob......Jacob's Reports, Chancery, Eng.
Jeff......Jefferson's Reports, Va.
Jenk......Jenkin's Reports, Exch. Eng.
Johns......Johnson's Reports, N. Y. (Supreme Ct. and Ct. of Errors).
Johns. Cas......Johnson's Cases, N. Y. (Supreme Ct. and Ct. of Errors).
Johns. Ch......Johnson's Chancery Reports, N. Y.
Johns. V. C......Johnson's Chancery Reports, Eng. (Vice Chancellors).
Johns. and H......Johnson and Hemming's Reports, Chancery, Eng.
Jones L......Jones's Law Reports, N. C.
Jones Eq......Jones's Equity Reports, N. C.
Jones, Pa......Jones's Reports (11 and 12 Pa. St.).
Jones, T......Sir T. Jones's Reports, K. B. Eng.
Jones, W......Sir W. Jones's Reports, K. B. Eng.
Jones and La T......Jones and La Touche's Irish Chancery Reports.
Jur......The Jurist, Eng.
Jur. N. S......Jurist, New Series, Eng.
Kay......Kay's Reports, Chancery, Eng.
Kay and J......Kay and Johnson's Reports, Chancery, Eng.
Keb......Keble's Reports, K. B. Eng.
Keen......Keen's Reports, Roll's Court, Eng.
Keilw. or Keil......Keilway's Reports, K. B. Eng.
Kel......Sir John Kelyng's Reports, K. B. Eng.
Kel. W......W. Kelynge's Reports, K. B. Eng.
Kelly......Kelly's Reports (1-3 Ga.).
Ken......Kenyon's Reports, K. B. Eng.
Ken. Ch......Kenyon's Chancery Cases, Eng.
Kern......Kernan's Reports (11-14 N. Y.).
Keyes.....Keyes's Reports, Ct. of Appeals, N. Y. (Most of these
 cases are better reported in Abbott's Decisions.)
Kirby......Kirby's Reports, Conn.
Knapp......Knapp's Privy Council Cases, Eng.
L. and C......Leigh and Cave's Crown Cases, Eng.
L. R. 1, 2, etc., A.
 and E......English Law Reports, Admiralty and Ecclesiastical.
L. R. C. C......" " " Crown Cases Reserved.
L. R. C. P......" " " Common Pleas.
L. R. Ch. App......" " " Chancery Appeals.
L. R. Eq......" " " Equity Cases.
L. R. Ex......" " " Exchequer.
L. R. H. L......" " " House of Lords.

L. R. P. C.	English Law Reports, Privy Council Cases.
L. R. P. and D.	“ “ “ Probate and Divorce.
L. R. Q. B.	“ “ “ Queen’s Bench.
L. R. Sc. App.	“ “ “ Scotch and Divorce Appeals.
L. J. Rep.	Law Journal Reports, Eng.
La	Lane’s Reports, Exchequer, Eng.
La. An.	Louisiana Annual Reports.
Lab.	Labatt’s Reports, Cal.
Lalor	Lalor’s Supplement to Hill and Denio’s Reports, N. Y.
Lans	Lansing’s Reports, Supreme Court, N. Y.
Lat	Latch’s Reports, K. B. Eng.
Ld. Ken.	Kenyon’s Reports, K. B. Eng.
Ld. Raym.	Lord Raymond’s Reports, K. B. Eng.
Lea	Lea’s Reports, Tenn.
Leach	Leach’s Crown Cases, Eng.
Lee	Lee’s Consistory Reports, Eng.
Lee temp. Hard ...	Lee’s Reports, K. B. <i>tempore</i> Hardwick, Eng.
Leg. Chron. Rep. ...	Legal Chronicle Reports, Pa.
Leg. Gaz. Rep.	Legal Gazette Reports, Pa.
Leigh	Leigh’s Reports, Va.
Leon	Leonard’s Reports, K. B. Eng.
Lev	Levinz’s Reports, K. B. Eng.
Lew. C. C	Lewin’s Crown Cases, Eng.
Ley	Ley’s Reports, K. B. Eng.
Lilly	Lilly’s Reports, N. P. Eng.
Lit. C. P.	Littleton’s Reports, C. P. Eng.
Litt	Littell’s Reports, Ky.
Litt. Sel. Cas.	Littell’s Select Cases, Ky.
Ll. and G.	Lloyd and Gould’s Irish Chancery Reports.
Lofft	Lofft’s Reports, K. B. Eng.
Lowell	Lowell’s Reports, U. S., Dist. of Mass.
Lush	Lushington’s Admiralty Reports, Eng.
Lut	Lutwych’s Reports, C. P. Eng.
M. D. and D	Montagu, Deacon and De Gex’s Bankruptcy Reports, Eng.
M. and Ayr	Montagu and Ayrton’s Bankruptcy Reports, Eng.
M. and H	Murphy and Hurlstone’s Reports, Exch. Eng.
M. and McA	Montagu and McArthur’s Bankruptcy Reports, Eng.
M. and S.	Maule and Selwyn’s Reports, K. B. Eng.
M. and W.	Meeson and Welsby’s Reports, Exchequer, Eng.
McAll	McAllister’s Reports, 9th Circuit, U. S.
McCart	McCarter’s Reports (14 and 15 N. J. Eq.).
McCle	McClelland’s Reports, Exchequer, Eng.
McCle. and Yo ...	McClelland and Younge’s Reports, Exch. Eng.
McGloin	McGloin’s Reports, La.
McLean	McLean’s Reports, 7th Circuit, U. S.
Mac. and G	Macnaghten and Gordon’s Reports, Chancery, Eng.
Mac Ar.	Mac Arthur’s Reports (Supreme Ct. Dist. of Columbia).
MacL. and R.	MacLean and Robinson’s Scotch Appeals.

- Macq. H. L. C.**.....Macqueen's Scotch Appeal Cases (House of Lords).
Madd.....Maddock's Reports, Chancery, Eng.
Man. and G.....Manning and Granger's Reports, C. P. Eng.
Man. and R......Manning and Ryland's Reports, K. B. Eng.
Mar.....March's Reports, K. B. Eng.
Marr.....Marriott's Admiralty Reports, Eng.
Marsh.....Marshall's Reports, C. P. Eng.
Marsh. A. K.....A. K. Marshall's Reports, Ky.
Marsh. J. J.....J. J. Marshall's Reports, Ky.
Mart. N. C.....Martin's Reports, N. C.
Mart. La.....Martin's Reports, La.
Mart. N. S.....Martin's Reports, La., New Series.
Mart. and Yerg....Martin and Yerger's Reports, Tenn.
Mas.....Mason's Reports, 1st Circuit, U. S.
McCord.....McCord's Reports, S. C.
McCord Eq.....McCord's Equity Reports, S. C.
McCrary.....McCrary's Reports, 8th Circuit, U. S.
Meigs.....Meigs's Reports, Tenn.
Mer. or Meriv.....Merivale's Reports, Chancery, Eng.
Met. or Metc.....Metcalf's Reports (42-54 Mass.).
Met. Ky.....Metcalf's Reports, Ky.
Miles.....Miles's Reports, Pa.
Mills.....Mills's Reports, S. C.
Minor.....Minor's Reports, Ala.
Mo. App.....Reports of St. Louis Ct. of Appeals, Mo.
M'Mull.....M'Mullan's Reports, S. C.
M'Mull. Eq.....M'Mullan's Equity Reports, S. C.
Mod.....Modern Reports, K. B. Eng.
Moll.....Molloy's Chancery Reports, Ireland.
Mon. B.....Ben Monroe's Reports, Ky.
Mon. T. B.....T. B. Monroe's Reports, Ky.
Mont. B. C.....Montagu's Bankruptcy Cases, Eng.
Mont. and Ayr.....Montagu and Ayrton's Bankruptcy Cases, Eng.
Mont. and B.....Montagu and Bligh's Reports, Bankruptcy, Eng.
Mont. and Chit....Montagu and Chitty's Reports, Bankruptcy, Eng.
Mont. and Mac.....Montagu and Macarthur's Bankruptcy Cases Eng.
Mont. D. and D....Montagu, Deacon, and De Gex's Reports, Bankruptcy, Eng.
Moo. C. C.....Moody's Crown Cases, Eng.
Moo. and M., or M.
 and M......Moody and Malkin's Reports, N. P. Eng.
Moo. and R., or M.
 and R.....Moody and Robinson's Reports, N. P. Eng.
Moo. C. P.....Moore's Reports, C. P. Eng.
Moo. K. B.....Moore's Reports, K. B. Eng.
Moo. and P.....Moore and Payne's Reports, C. P. Eng.
Moo. and S.....Moore and Scott's Reports, C. P. Eng.
Moore.....Moore's Reports, K. B. Eng.

- Moore P. C** Moore's Privy Council Cases, Eng.
Morr. St. Cas. Morris's State Cases, Miss.
Morris Morris's Reports, Iowa.
Mor. Tran. Morrison's Transcript, U. S. Supreme Court Decisions.
Mos. Moseley's Reports, Chancery, Eng.
Munf. Munford's Reports, Va.
Murph Murphey's Reports, N. C.
Myl. and Cr. Mylne and Craig's Reports, Chancery, Eng.
Myl. and K. Mylne and Keen's Reports, Chancery, Eng.
Myr. (Cal.) Myrick's Probate Reports, Cal.
N. Benl New Benloe, K. B. Reports, Eng.
N. Chip N. Chipman's Reports, Vt.
N. C. Con. North Carolina Conference Reports.
Nat. Bank. Reg. National Bankruptcy Register, U. S.
N. J. Eq. New Jersey Equity Reports.
N. J. L. New Jersey Law Reports.
N. R The New Reports. (See B. and P. N. R.)
Nels. Nelson's Reports, Chancery, Eng.
N. and H. Nott and Huntingdon's Reports (U. S. Ct. of Claims).
N. and Hop. Nott and Hopkin's Reports (U. S. Ct. of Claims).
N. and McC Nott and McCord's Reports, S. C.
Nev. and M. Neville and Manning's Reports, K. B. Eng.
Nev. and P Neville and Perry's Reports, K. B. Eng.
Newb. Newberry's Admiralty Reports, U. S.
Norris Norris's Reports (82-96 Pa. St.).
North. Northington's Reports, by Eden, Chancery, Eng.
Notes of Cas. Notes of Cases (Adm. and Eccl.), Eng.
Noy Noy's Reports, K. B. Eng.
N. Y. Civ. Pr. Rep. N. Y. Civil Procedure Reports.
O. Benl Old Benloe, C. P. Eng.
Ohio N. S., or Ohio St. Ohio Reports, New Series (Ohio State Reports).
Olcott Olcott's Admiralty Reports, U. S. Dist. Ct., N. Y.
Orl. Bridgman Orlando Bridgman's Reports, C. P. Eng.
Otto Otto's Reports, Supreme Court, U. S. (91-106 U. S.).
Outerbridge Outerbridge's Reports (97-99 &c. Pa. St.).
Overt Overton's Reports, Tenn.
Ow Owen's Reports, K. B. Eng.
P. C. Pleas of the Crown.
P. D. Probate Division, English Law Reports.
P. F. Smith P. F. Smith's Reports (51-81½ Pa. St.).
P. and D., or Per. and Dav Perry and Davison's Reports, K. B. Eng.
P. and W Penrose and Watiss' Reports, Pa.
P. Wms. Peere Williams's Reports, Chancery, Eng.
Pa. L. J. Rep Pennsylvania Law Journal Reporter.
Pa. St. Pennsylvania State Reports.
Paige Paige's Reports, Chancery, N. Y.
Paine Paine's Reports, 2d Circuit, U. S.

Pal. or Palm.	Palmer's Reports, K. B. Eng.
Par. or Park.	Parker's Reports, Exchequer, Eng.
Park. Cr.	Parker's Criminal Reports, N. Y.
Pars. Eq. Cas.	Parsons' Equity Cases, Pa.
Pat. and H.	Patton and Heath's Reports, Va.
Pea. N. P.	Peake's Nisi Prius Cases, Eng.
Pearson	Pearson's Reports, Pa.
Peck	Peck's Reports (11-30 Ill.).
Peck	Peck's Reports, Tenn.
Pen. or Penn.	Pennington's Reports (2 and 3 N. J. Law).
Penny	Pennsylvania Supreme Court Reports (by Pennypacker).
Pet.	Peters's Reports, Supreme Ct. U. S.
Pet. Adm.	Peters's Admiralty Reports, U. S. (Dist. of Pa.).
Pet. C. C.	Peters's Reports, 3d Circuit, U. S.
Phil.	Phillips's Reports, Chancery, Eng.
Phil.	Phillips's Law Reports, N. C.
Phil. Eq.	Phillips's Equity Reports, N. C.
Phila. Rep.	Philadelphia Reports, Pa.
Phillim. or Phill. Ec.	Phillimore's Reports, Ecclesiastical, Eng.
Pick.	Pickering's Reports (18-41 Mass.).
Pike.	Pike's Reports (1-5 Ark.).
Pinn.	Pinney's Reports, Wis.
Pitts. Rep.	Pittsburgh Reports, Pa.
Plowd.	Plowden's Reports, K. B. Eng.
Pol.	Pollexfen's Reports, K. B. Eng.
Poph.	Popham's Reports, K. B. Eng.
Port. Ala. or Port.	Porter's Reports, Ala.
Port. Ind.	Porter's Reports (3-7 Ind.).
Port. Mo.	Porter's Reports (42-59 Mo.).
Pr. Ch.	Precedents in Chancery (Finch), Eng.
Prac. Reg.	Practical Register, C. P. Eng.
Price or Pr.	Price's Reports, Exchequer, Eng.
Q. B.	Adolphus and Ellis's Reports, New Series, Q. B. Eng.
Q. B. D.	English Law Reports, Queen's Bench Division.
Q. B. Upp. C.	Queen's Bench Reports, Upper Canada.
Quincy.	Quincy's Reports, Mass.
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- Seld. Notes**.....Selden's Notes of Cases, N. Y.
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and Bea.	Vesey and Beames's Reports, Chancery, Eng.
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- W. Jones**.....W. Jones's Reports, K. B. Eng.
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Wright, Pa......Wright's Reports (37-50 Pa. St.).
WytheWythe's Reports, Chancery, Va.

- Y. B.....Year Book.
Y. and C. Ch.....Younge and Collyer's Chancery Cases, Eng.
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 You. and Coll.....Younge and Collyer's Exchequer Reports, Eng.
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Zab.....Zabriskie's Reports (21-24 N. J. Law).

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- Abb. N. C.....Abbott's New Cases, N. Y.
Asp. M. C.....Aspinall's Maritime Cases, Eng.
Atl. Rep.....Atlantic Reporter, (cases in the courts of Me., N. H., Vt.,
 R. I., Conn., N. J., Pa., Del., and Md.).
Bl. D. and O.....Blackham, Dundas, and Osborne's Reports, N. P. Ireland.
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Eng. Ecc.....English Ecclesiastical Reports.
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Hayes.....Hayes's Reports, Exchequer, Ireland.
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Hopk. Adm.....Hopkinson's Admiralty Judgments, Pa.
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Morr. B. C.	Morrell's Bankruptcy Cases, Eng.
N. E. Rep.	North Eastern Reporter, (cases in the courts of Mass., N. Y., Ohio, Ind., and Ill.).
N. W. Rep.	North Western Reporter, (cases in the courts of Mich., Wis., Minn., Iowa, Neb., and Dakota).
N. Y. St. Rep.	New York State Reporter, (all the N. Y. courts).
N. Y. Supm.	New York Supreme Court Reports.
N. Y. Supp.	New York Supplement, (courts of New York below the Court of Appeals).
Pac. Rep.	Pacific Reporter, (cases in the courts of Cal., Or., Kan., Col., Nev., Mont., Wyo., Ariz., Wash., Utah, N. Mex., and Idaho).
Pater.	Paterson's Reports, House of Lords (Scotch).
Paton.	Paton's Reports, House of Lords (Scotch).
Rep. Ch.	Reports in Chancery, Eng.
Ridg. L. and S.	Ridgeway, Lapp, and Schoales's Reports, K. B. Ireland.
S. E. Rep.	South Eastern Reporter, (cases in the courts of Va., W. Va., N. Car., S. Car., and Ga.).
S. W. Rep.	South Western Reporter, (cases in the courts of Ky., Tenn., Ark., Mo., and Tex.).
Saund. and C.	Saunders and Cole's Reports, Bail Court, Eng.
Sm. and Bat.	Smith and Batty's Reports, K. B. Ireland.
Smy.	Smythe's Reports, C. P. Ireland.
So. Rep.	Southern Reporter, (cases in the courts of Fla., Ala., Miss., and La.).
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